IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1315

HOWARD ALEXANDER, *et al.*,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

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CHRONOLOGICAL LIST OF IMPORTANT DATES

May 19, 1970 - Petition for Order to Declare Books Obscene Pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as amended

Subpoena Duces Tecum Issued returnable May 22, 1970

May 22, 1970 - Motion Quash Subpoena Duces Tecum Denied

June 3, 1970 - Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books

Show Cause Order returnable July 17, 1970

June 12, 1970 - Motion for Stay; Motion to Dismiss; Answers to Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books

July 30, 1970 - Answer to Petition for Order to Declare Books Obscene Pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as Amended

August 19, 1970 , - Argument, Motion to Dismiss

November 4, 1970 - Trial Commenced.

November 5, 1970 - Trial Concluded.

November 20, 1970 - Memorandum Opinion, Court of Hustings for the City of Portsmouth

December 30, 1970 - Order of the Court of Hustings for the City of Portsmouth

INDEX TO APPENDIX

The Opinion of the Supreme Court of Virginia, 212 Va. 554, 186 S.E.2d 43 (1972), appears in the Appendix to the Petition for Writ of Certiorari at page 1a.

The Petition for Order to Declare Books Obscene pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as Amended, appears in the Appendix to the Petition for Writ of Certiorari herein, at page 3a.

The Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 4a.

The Notice accompanying the Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 5a.

The Show Cause Order of the Court of Hustings for the City of Portsmouth entered June 3, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 6a.

The Memorandum Opinion of the Court of Hustings for the City of Portsmouth entered November 20, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 16a.

The Order of the Court of Hustings for the City of Portsmouth entered December 30, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Page 18a.

§ 18.1-236.3 Code of Virginia, 1950, as Amended, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 19a.

Amendments to the Constitution of the United States of America appear in the Appendix attached to the Petition for Writ of Certiorari herein, as follows:

Amendment One at page 23a
Amendment Five at page 23a
Amendment Six at page 23a
Amendment Seven at page 24a
Amendment Fourteen at page 24a

VIRGINIA: IN THE COURT OF HUSTINGS
FOR THE CITY OF PORTSMOUTH

IN THE MATTER OF A NUMBER OF
BOOKS ALLEGED TO BE OBSCENE
PURSUANT TO SECTION 18.1-236.3

Law Docket
No. 6244

MOTION TO DISMISS PETITION

Now comes the Respondents, Howard Alexander and Frank Collier, and Village Books, Inc., and Media Arts and Guild Press Ltd., and move the Court to dismiss the Petition herein upon the ground that said Petition is based upon Section 18.1-236.3 of the Code of Virginia, which section of the Code is unconstitutional being repugnant to the First Amendment to the Constitution of the United States of America.

For grounds hereof, Respondents state that said Statute permits a prior restraint upon presumptively protected literary materials and permits suppression of non-obscene literary materials without a prior adversary hearing and permits suppression of non-obscene materials for an indefinite time and is therefor unconstitutional; *Kingsley Books, Inc. v. Brown,* 354 U.S. 436; *Freedman v. Maryland,* 380 U.S. 51; *Bantam Books, Inc. v. Sullivann,* 372 U.S. 58.

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[Certificate of Service Omitted in Printing]

[Caption omitted in printing]

MOTION FOR A STAY OF PROCEEDINGS

Now comes the Respondents, Howard Alexander and Frank Collier and Village Books, Inc., and move the Court to stay the proceedings herein to allow the United States District Court for the Eastern District of Virginia, Norfolk Division, to determine the constitutionality of Section 18.1-236.3 of the Code of Virginia in civil action number 429-70-N filed June 11, 1970, entitled: Howard Alexander, et al. v. Von L. Piersall, Jr., Commonwealth Attorney for the City of Portsmouth, et al., a copy of which Complaint is attached hereto as Exhibit A.

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ANSWER TO PETITION FOR ORDER TO DECLARE BOOKS OBSCENE ETC.

Now comes the Respondents, Howard Alexander and Frank Collier, and Village Books, Inc., and Media Arts and Guild Press Ltd., answering the Petition For Order To Declare Books Obscene, etc., as follows:

1. Respondents admit the allegations of fact contained in paragraph (1) of the Petition.

2. Respondents admit that Howard Alexander and Frank Collier are engaged in the sale and commercial distribution of magazines at the address 513 High Street in the City of Portsmouth, Virginia, the premises of the Respondent, Village Books, Inc., Respondents denying that said magazines are obscene as alleged and denying the remaining allegations of paragraph (2) of the Petition.

3. Respondents admit that the names or titles and publishers of the challenged magazines involved herein are attached to the Petition, as alleged in paragraph (3) of the Petition.

4. Respondents admit that some of the magazines involved contain photographs of totally nude bodies of males and females wherein the genitals of the models are exposed. Respondents deny the remaining allegations, paragraph (4) of the Petition.

Wherefore, Respondents respectfully pray the Court to dismiss the Petition herein, without costs to the Respondents.

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TRANSCRIPT OF PROCEEDING

Before Hon. R. Winston Bain, Judge,
Portsmouth, Virginia,
May 22, 1970.

* * * *

[2] MR. PIERSALL: Rather than look at the index 18.1-236 is the section primarily involved.

THE COURT: All right, I will be glad to hear the moving party.

MR. LAWLESS: Your Honor, initially I would have a motion to quash the subpoena duces tecum.

* * * * *

[13] MR. PIERSALL: Well, your Honor, my point is he is not an adversary party as set out in the motion to quash, and that certainly he is here today. They have appeared and if there is any objection to notice we feel like they have certainly waived that by appearing and in arguing the matter. We feel that, primarily, of course they are not an adversary party in the matter.

THE COURT: I think the Commonwealth's position is well taken on this and that the court does not feel that by this proceeding on the subpoena duces tecum that this gentleman that you spoke of, Mr. Collier, is being in any way put in the position of incriminating himself. The court feels the Commonwealth's position is well taken and overrules the motion to quash the subpoena duces tecum.

MR. LAWLESS: Note our exception. May I have a short recess to confer with my client?

* * * * *

Before Hon. R. Winston Bain, Judge,
Portsmouth, Virginia,
June 12, 1970.

* * * * *

[2] MR. DIETZ: Thank you, sir. At this time on behalf of the respondent, I would like to leave to file a motion for a stay of these proceedings. In the Motion I have stated, a copy of the complaint which we filed in the United States District Court for the Eastern District of [3] Virginia, Norfolk Division is attached, but I understand that the court and the Commonwealth attorney, Mr. Piersall, have received copies of that complaint and therefore have not attached same to this motion.

THE COURT: No, that is all right, we received them yesterday.

MR. DIETZ: Now, your Honor, if I might address myself to the motion for a stay of proceedings.

THE COURT: All right, I will be glad to hear from you. Mr. Piersall, have you seen a copy of it?

MR. PIERSALL: Yes, sir, I have a copy of it.

* * * * *

[14] THE COURT: Well, gentlemen, the very fact that you have filed a civil action in the federal court, I don't feel that that as such is reason that I should consider this motio for a stay under the procedure as set forth in our Code. Not feeling there is any merit in the motion, I am going to overrule your motion for a stay in the proceedings.

MR. DIETZ: Under the Virginia procedure, I believe it is proper that I at this time on behalf of the respondents request an exception to your Honor's ruling.

THE COURT: That is correct.

Gentlemen, let us take a little break now before we go into the other matter.

(Whereupon, the court recessed at 10:50 A.M. After recess the following took place:)

MR. PIERSALL: Judge, I will speak. Mr. Dietz and I would make a joint motion to continue this hearing on my motion for a temporary restraining order until June the 24th, I believe.

MR. DIETZ: That is correct, sir.

MR. PIERSALL: And at that time we will [15] return at the point where we are now.

THE COURT: Very well. Then upon the joint motion of both of you the court will continue this case until ten o'clock A.M. on Wednesday, the 24th day of June of this year. So, gentlemen, we will all reconvene for the hearing on the motion at that time.

MR. DIETZ: Thank you, sir.

THE COURT: Fine.

* * * * *

August 19, 1970

* * * * *

[2] MR. DIETZ: Yes, sir. May it please Your Honor, the respondents in this case have filed a motion to dismiss the petition based upon the position that this provision of the Virginia Code 18.1-236.3 is repugnant to the Constitution of the United States, Amendments 1, 4, 5 and 14.

I would like at this time to briefly argue this motion and ask the Court to dismiss the petition upon this ground.

First, we contend that the code, Virginia Code, in Sections 7 and 8 which I will now read, Section 7—Excuse me; I think I will skip over 7 and present provision Section 8: "If an appearance is entered and an answer filed, the Court shall order the proceedings set on the

calendar for a prompt hearing. The Court shall conduct the hearing in the court of civil procedure applicable to the cases without a jury," et cetera.

Now, the first point that we wish [3] to raise is that the respondents, by this procedure, are denied their right to trial by jury.

At this time, I will formally, upon behalf of the respondents, demand a trial by jury of all of the issues raised by this petition.

I realize that the code specifically prohibits this demand, so I assume that Your Honor will deny the request for the jury trial.

That is the first point.

THE COURT: I can rule on that right now. I overrule your motion.

* * * * *

[4] Now, the next point that we allege the Virginia statute is unconstitutional in that it discriminates against adults who have a right to purchase and possess [5] erotic literature, being a matter of taste, and that is, according to Section 7 of your Virginia Code, and Section 7, in spelling out the standards that the Court should follow, says–

THE COURT: Wait a minute. Which section are you referring to?

MR. DIETZ: Section 7 of the Virginia Code which is 18.1-236.3. I should call it Subsection 7.

* * * * *

MR. DIETZ: * * * [12] Now, the next point that I would raise is that the code provision which is Virginia Code Provision Subsection 5, which provides, after an order to show cause was issued pursuant to the code, upon four days notice to be given to the persons in a

manner prescribed by the Court, the Court may issue a temporary [13] restraining order against the sale or the distribution of the book alleged to be obscene.

We contend that that section makes the statute unconstitutional, that subsection makes the statute unconstitutional because it allows for a prior restraint, the restraint prior to any adversary judicial hearing, and the authority for that position, Kingsley Books, Inc., v. Brown, which I cited before, Friedman v. Maryland, 380 U.S. 51, and Bantam Books, Inc., v. Sullivan, 372 U.S. 58.

* * * * *

[14] I might state that in your Virginia Code, there are no time limits established. There is no statement other than that the Court should promptly consider—Well, I will go into detail on that point because I think this is very important and spell it out clearly.

The point is that the code is unconstitutional because it does not provide any safeguard regarding time limitations of the procedures set forth in the code.

Now, in the code section, Subsection 3, it provides that "Upon the filing of the petition, that the Court, in turn or on vacation shall examine the alleged books to see if they are obscene." That is very clear once the petition is filed.

Following that, there is no other guarantee of prompt action contained other than Section 8, or I should say Subsection 8 of the code where it says, "If an appearance is entered and an answer filed, the Court shall order the proceedings set on the calendar for a prompt hearing."

After that, there is absolutely nothing in your code provision prescribing time limitations.

According to the decisions, starting with Kingsley Books v. Brown, followed in all the cases, the Supreme

Court has had Bantam Books, every one, wherever the statute does not have time limitations imposed, then it has been held unconstitutional because it allows for unlimited delay, the restraint of materials without decisions.

* * * * *

[17] MR. DIETZ: * * * [19] And now the next point that I would raise as far as the claimed unconstitutionality of the Virginia Code is that Code Subsection 8-b does not provide proper standards for consideration of the national community standards of tolerance.

THE COURT: Which section?

MR. DIETZ: Subsection 8-b. Subsection 8-b provides a degree of public acceptance of a book or books of similar character within a county or city in which the proceeding is brought.

That should be the standard Your Honor should follow in determining the alleged obscenity of a material.

My point to the Court is that Your Honor is not to take the local standard for the City of Portsmouth, or I think this—correct me if I am incorrect—[20] I think this is Norfolk County.

THE COURT: No. Norfolk County no longer exists. You have the City of Chesapeake and the City of South Norfolk some years ago merged—Well, old Norfolk County and the City of South Norfolk merged and became the new City of Chesapeake.

Virginia used to have twenty years ago one hundred counties, but now I think it's approximately ninety-seven.

A couple of them merged over on the Peninsula; Newport News and Hampton merged with their counties, adjoining counties.

MR. DIETZ: The point that I am making to the Court is that this community, whether it be county or city, is too limited. I would urge the Court to adopt the position that even a state-wide area, if it's stated for the State of Virginia, that that would be too limited, and the position I urge the Court to adopt is that it's a national community standard that must be considered because it's a national Constitution.

* * * * *

[28] MR. DIETZ: Now, we also contend that the entire code section is unconstitutionally vague and indefinite. It does not spell out, at least as we can understand it, whether this is an injunction statute or a quasi-criminal statute. The code [29] provision Section 13 says—I should say Subsection 13—says, "It's expressly provided that the petition and proceeding authorized under this article relating to books said to be obscene shall apply only to cases where the establishment of such scienter is thought to be useful or desirable by the petitioner and the provisions of Section 18.1-236.3 shall in nowise be construed to be a necessary prerequisite to the filing of criminal charges under this article."

Now, that is the anchorman, the very last words of the code provision.

Now, I can't determine from that whether this authorizes the Court, if you determine that these books are obscene, to issue an injunction prohibiting the sale or possession of these books because the only provision as far as an injunction is in subparagraph 5 wherein the code provides "When an order to show cause is issued pursuant to this article and upon four days notice to be given to the person and in the manner prescribed by the [30] Court, the Court may issue a temporary restraining order against

the sale or distribution of the book alleged to be obscene."

The code provision is absolutely void as far as granting the Court jurisdiction to enter any permanent injunction or any other action, and I just don't know if this is what would follow of if this is really quasi-criminal because if it's quasi-criminal and it so provides by subparagraph 13 "that the purpose is to establish scienter in cases where the establishment of scienter is thought to be useful," in my way of thinking that knowledge scienter and the establishment thereof could only be useful or desirable in a criminal prosecution where the defendant could conceivably raise as a defense under Smith v. California, a case like that, that he didn't know that the books or magazines that he was selling in his book store were obscene, and if the purpose of this proceeding is to establish this element of the criminal charge which [31] the Supreme Court of the U.S. is a necessary element to be proven in any obscenity criminal prosecution, then I would say that the defendant in a criminal case, the respondent in this civil case is certainly being denied his right of trial by jury on that issue which would have been adjudicated before a civil court, sitting without a jury.

I would certainly say that that raises a Constitutional issue.

* * * * *

[41] MR. DIETZ: * * * [43] Your Honor, there was one other point that I wanted to raise before but which I didn't. I would like to mention it to Your Honor briefly.

I feel that the Virginia Code, which I suddenly lost in this maze of papers, the Virginia Code provision is unconstitutional and that the procedures by which it was

applied in this case are unconstitutional, and I am referring to at the very outset of this case, and I am not sure but I think it was even prior to the filing of the petition with the Court, there was filed and served upon the respondent, Collier, Village Book Store, and there was filed but I don't think it was actually served [44] upon the respondent, Alexander, subpoena duces tecum requiring those defendants to appear in court to produce all of the magazines which were originally listed in the subpoena.

Now, we feel that this was unconstitutional in violation of their rights, the respondents' rights under the Fourth Amendment and under the Fifth Amendment because you were forcing them to supply evidence and testimony against themselves by use of the subpoena duces tecum.

I refer, Your Honor, to Boyd v. U.S., 116 U.S. 616 at Page 634 and 635. That is also found in 6 Supreme Court 524, 29 Lloyds Edition 746.

* * * * *

[49] THE COURT: Very well, gentlemen. I will take this matter under advisement and, Mr. Dietz, are you having this transcript prepared?

MR. DIETZ: Yes, Your Honor. I certainly intend to order a copy of the transcript as I do in all cases, in all proceedings in all cases in which I am involved, and I will formally request the reporter to submit the original to the Court as soon as possible so you will have the opportunity to use it in your deliberations of the case.

* * * * *

[50] THE COURT: Gentlemen, that concludes the hearing. We will recess now for the summer.

MR. DIETZ: The only thought that occurs to this counsel, of course I have no way of knowing when the reporter will complete the transcript and when she will be able to deliver it to the Court.

Your Honor is going on vacation. I don't know when you will have an opportunity to rule, but I assume your ruling will be given prior to the trial date, the 23rd of September.

THE COURT: I will rule around that time, but let me express myself this way. Prepare yourself now without my having considered the motion at all, prepare yourself now for the adversary hearing [51] on September 23. This is the vacation time. I could try to let you hear from me sometime before, but if you don't hear from me, then please assume that the motion will be overruled on the morning of the 23rd.

MR. DIETZ: Thank you.

* * * * *

November 4, 1970

* * * * * *

[3] MR. PIERSALL: Your Honor, I think I can say this safely. There will be a slight stipulation, briefly, as to the facts in this case. We would like to stipulate, and I believe we can, that these books which have been offered for sale in the City of Portsmouth in the Adult Book Store were offered to adults only.

THE COURT: Is that correct?

MR. DIETZ: Yes, Your Honor. What the Respondent would agree to stipulate and what I informed Mr. Piersall is that all of these magazines were on display in my client's adult book store in the City of Portsmouth, and any adult who came into the store who wanted to buy the books or [4] magazines who had the price of the book would have been permitted to purchase it.

THE COURT: Very well, sir.

MR. DIETZ: In different words, but the same thing. We will so stipulate and the Commonwealth will agree to that so it will not be necessary for the State to offer testimony that these books were sold or any attempt to purchase because they were there to be sold.

THE COURT: Fine.

MR. PIERSALL: That's fine, Judge.

I would like to call as my first witness, Mr. Holley.

* * * * *

ROBERT L. HOLLEY, a witness having been first duly sworn, was called to the witness stand in behalf of the Commonwealth and upon being examined, testified as follows:

DIRECT EXAMINATION

BY MR. PIERSALL:

Q. State your name, please. A. Robert L. Holley.

* * * * *

[5] MR. PIERSALL:

Q. You are Robert L. Holley. What is your occupation? [6] A. District Manager, Equitable Life Insurance Society of the United States.

Q. What is your address? A. Residence or business?

Q. Residence. A. Residence, 4500 Norman Road, Portsmouth.

Q. City of Portsmouth? A. Yes, sir.

Q. How long have you been a resident of the City of Portsmouth? A. Fifteen years.

Q. You were not born here, is that right? A. That's right.

Q. Where were you born? A. Pennsylvania.

Q. Where did you go to school? A. College of William and Mary, Williamsburg.

Q. Did you go to school in Pennsylvania at all? A. Elementary school; public school system in Pennsylvania.

Q. Since you graduated from college, have you been in Virginia? [7] A. Yes. Since graduating in 1941 I worked throughout the State of Virginia.

Q. How long would you say you have been in Virginia. Would it be more than fifteen years? A. Yes; since 1946. I went to William and Mary and except for vacations, I have resided in Virginia.

Q. All right. Pursuant to a request by me did you examine certain books or magazines which were at the time in the custody of the Clerk of the Court of Hustings? A. Yes, I did.

Q. Will you step over here to this table, please, and look at these books? A. (Witness leaves witness stand.) Do you want me to identify all these books?

Q. I just want you to identify all these books. I just want you to look at them. They are in the same boxes I presume. Can you tell me whether or not you looked in the books in these boxes? A. Those boxes are similar, if not the same ones, I looked, at the books.

Q. Look at these and determine if these are the same ones. [8] A. Could it be determined by looking at this sheet?

Q. Yes, sir. Could you determine if you looked at these books on the list?

Mr. Dietz, can you identify this list of books I filed with my pleadings?

MR. DIETZ: Yes, sir. That is the list that was attached to the show cause order which was issued on June 3, 1970.

MR. PIERSALL:

Q. And you looked at the books which are on that list? A. Yes, sir.

* * * * *

[9] MR. PIERSALL: All right.

Q. Proceed, Mr. Holley.

A. To answer your question, it appears that those were the books that match this list, yes, sir.

Q. That's fine. Now, for what purpose did I ask you to look at these books and for what purpose did you look at these books? A. To see if they met a community standard as to obscenity.

Q. Have you personally had any experience other than this experience in examining and reviewing matters which were suggested to be obscene? A. Yes, sir.

Q. In what capacity have you had this experience? A. Several years ago, probably five to seven years ago, I was appointed chairman of an areawide Chamber of Commerce committee composed of four local cities plus Suffolk and Nansemond.

[10] Q. Four cities were in this? A. A representative from each city. As a committee we investigated obscene matters including movies and magazines, et cetera.

During this process of study we felt we found what the community standard was throughout the whole area.

Q. What efforts did you make in order to find out what the local community standard was? A. We purchased magazines from different locations throughout the community and displayed these to different civic groups and different organizations that we met with and got their reaction to them.

About two years ago I was asked to do a similar study here in the City of Portsmouth, and using the same process, I was told by a professional in the sampling

business that I probably contacted to what would be equivalent to about 30,000 people in the City of Portsmouth by sampling.

Q. By sampling? You didn't actually contact them? A. By sampling. I don't know how he arrived at this figure. I told him who I contacted. He [11] came up with this figure.

Q. Did you take certain books to clubs and have them look at these books? A. Yes, sir. At that particular time, the Assistant Commonwealth's Attorney asked me to assist him in the case. At that time I believe there were three books in another case.

I put those three along with seven other magazines that we had from this previous Chamber of Commerce committee, laid the ten out, and asked them to pick the three most objectionable books.

In every case but one, all three of those particular magazines were picked as most objectionable.

Q. Did you discuss with these groups their feelings as to what the community standard was insofar as the portrayal of sex in the magazines and movies and so on? A. Would you ask that question again? Did I discuss with them?

Q. Was there any discussion of any kind between you and the group that you met with concerning the community standards insofar as the display of sex in the books, magazines, and movies? [12] A. Yes, sir; general discussion.

MR. DIETZ: I am going to have to object to his question, not on the basis of hearsay but I would first like to know where these groups were and what community standards; whether it was a community standard for the City of Portsmouth or supposedly the community standard for Newport News or wherever it was.

I think that until that is added to the question then the answer must be too indefinite to be material to the issues before this court.

MR. PIERSALL: I thought, Judge, he had already stated. I may be wrong.

THE COURT: He mentioned about the community standards but I don't think he has told us exactly what it is.

MR. PIERSALL: All right, sir.

Q. Mr. Holley, in your research in this matter, what area were you dealing with? A. In the immediate section of the City of Portsmouth and the immediate Chesapeake Borough.

Q. That would be the immediate area of [13] Chesapeake and Portsmouth? A. Yes, sir. Basically, the Western Branch Borough of Chesapeake.

Q. Nor the whole part of Chesapeake? A. No, sir. I am referring now to this whole study that I made about a year and a half ago; two years ago.

THE COURT: Your first study, I understand, you say it was very wide and that you were chairman of a committee?

THE WITNESS: Yes, sir.

THE COURT: United with other chambers of Norfolk, Virginia Beach, Portsmouth, Newport News, Suffolk, and Nansemond, I believe you said?

THE WITNESS: Yes, sir; five or six years ago.

BY MR. PIERSALL:

Q. That was some years ago, and you investigated the community standards or area standards then? A. Yes, sir.

Q. Then a year and a half ago you did this work in Portsmouth and the Western Branch District of the City of Portsmouth? Chesapeake? A. Yes, sir.

THE COURT: Now you can ask what standards were developed.

[14] BY MR. PIERSALL:

Q. As I understand it, you met with groups in the area? A. Yes, sir.

Q. What is the way you performed your study? A. Yes, sir. Some were neighborhood groups. Some were Navy wives clubs; different civic organizations. Different organizations just in neighborhoods that might have come in. No definite organizations as such; just a group of people from neighborhoods.

Q. Now, you mentioned Navy wives' clubs. Obviously from the definition of Navy wives, you are talking about wives of people who are stationed here with the Navy? A. Yes, sir.

Q. Are these people from all over the community? A. I would say so. I have no knowledge of that but I would say they were pretty well representative throughout the country.

Q. You have lived in Portsmouth fifteen years? A. Yes, sir.

[15] Q. Does the Navy bring people here from all over the country? A. I would assume so, sir.

Q. Well, all right. In meeting with these groups were you able to glean from them or determine by meeting with them what the standards of this community were; this community?

In the community of which you were speaking, were there standards insofar as the display and portrayal of sex in books and magazines? A. I feel so, yes, sir.

Q. When you looked at the magazines and pictures to which I am referring, which we have in court today, did I not ask you to look at them with the standard in mind? A. Yes, sir, you did.

Q. The standard that you had come up with? A. Yes, sir.

Q. Mr. Holley, how old are you? A. Forty-five. My insurance age is forty-six.

Q. Your insurance age is forty-six; all right.

Have you, in your forty-five years, had occasion to read national magazines, for instance? [16] A. Oh, absolutely.

Q. You watch television? A. Yes, sir.

Q. You go to the movies? A. Yes, sir.

Q. Do you also read books? A. Yes, sir.

Q. Do you read magazines of different national publications? A. Yes, sir.

Q. Have you ever had occasion to go to other parts of the country to watch TV or read books? A. Yes, sir; throughout the East Coast, basically.

Q. Have you had occasion to see any Broadway plays or any plays in Chicago? A. I have seen one Broadway play.

Q. Any other plays? A. Only Little Theatre.

Q. Little Theatre in the area? A. Yes, sir.

Q. Have you ever participated in Little Theatre plays? A. Yes, sir.

[17] Q. Put on by the local amateur theatre? A. Yes, sir.

Q. Would you be able to tell me whether or not, in your opinion, based on your experience, the standard of this city and the area that you reviewed is essentially the same as that of the nation?

MR. DIETZ: I object. This man is not qualified to say what is the standard of the nation. I will not, by that objection, even admit or agree that he is qualified to say what is the standard for this community, and I think Your Honor should permit the respondent the right to

cross-examine this man, the type of voir dire examination, Your Honor, as to his qualifications before he should be permitted to voice any opinion on any subject.

MR. PIERSALL: If Your Honor please, Mr. Holley has testified as to his own personal research insofar as the local standard is concerned and he has said that he is a business man, [18] forty-five years old, who has been aware of the surroundings in this county, and he has visited other states and he has read books, magazines, watched television, seen movies.

We offer him not only as an expert but as a citizen who knows the standards of this community; who is also aware of the standard, of the national standard.

I think he should be able to testify as to whether or not, in his opinion, the standard of this community is any different from the national standard.

I think he can do this for what it is worth.

THE COURT: In qualifying him as an expert, I will allow Mr. Dietz to examine him if he wants to.

MR. PIERSALL: That's fine. I have no objection to that. I will say this, Judge, that what is an expert in community standards would be a difficult problem to solve, to say the least.

An expert in a national standard, to say what it was, what it is, that [19] would be an impossible task.

I think Mr. Holley would not have to be qualified as an expert necessarily to give his opinion based on his experience for what this is worth and for the weight that it might carry insofar as how the local standard compares with the national standard.

* * * * *

[21] MR. PIERSALL: I asked him if he thought the local standard was essentially the same as the national standard.

THE COURT: Answer that.

THE WITNESS: In my opinion, yes.

MR. DIETZ: These magazines we have at issue are not to be judged in comparison with Life magazine and Look magazine.

THE COURT: If you are qualifying a man as to the national standard, does that mean he has to travel through fifty states to explore the subject?

MR. DIETZ: I will answer the question as candidly as I can. I have been out to California recently and there they have a special statute saying that it is not a city community standard, it is not a county community standard, but it is a statewide community standard.

I might say that the statute has not been tested as yet to the Supreme Court of the United States, but pursuant [22] to that statute in the State of California, the Attorney General's office has selected a group of, I think, two or three men and has sent them over the entire state and kept them traveling throughout the state constantly, sampling the media so that they can be qualified to testify as to the community standard.

Now, one question that I could ask this man is has he ever been to California? Has he ever purchased a magazine in California? Has he ever been in an adult book store in California?

Mr. Holley, have you ever been in an adult book store? MR. PIERSALL: Your Honor, I object. We are not trying a state standard, as he is arguing, so one particular state is not of any importance.

THE COURT: We are getting off the track a little bit. You are trying to establish Mr. Holley as an expert, and, as I understand it, he has stated that the standard of the

area here that he has looked into and the national standard, as he recognizes it, are one and [23] the same.

MR. PIERSALL:

Q. What is your basis for your knowledge of the national standard on the subject? A. Through my travels on the East Coast and talking with people throughout the country that I have come in contact with, including people from California.

THE COURT: I am inclined to think Mr. Holley is qualified.

MR. DIETZ: May I have some voir dire examination of Mr. Holley?

THE COURT: You certainly may examine him, yes, sir.

MR. DIETZ: Thank you.

CROSS EXAMINATION

BY MR. DIETZ:

Q. You said you conducted an examination about five to seven years ago of materials that were supposed to be questionable as to obscenity, is that correct? A. Yes, sir.

Q. Were they magazines? A. Most of them were magazines, yes, sir.

Q. What other material was included? [24] A. Movies.

Q. About a year and a half ago or two years ago you also conducted another investigation? A. If you want an exact time on that—Mr. Piersall, when was Grayson Sandie's case?

MR. PIERSALL: I don't know, exactly.

A. About that period of time?

MR. PIERSALL: Something like that.

MR. DIETZ:

Q. Well, it's your testimony. A year and a half; two years ago? A. Approximately that, yes, sir.

Q. Was that involving magazines? A. Yes, sir.

Q. Movies, too? A. No. sir.

Q. Now, as a part of your claim to qualification as to the national community standards, you say you go to moving picture theatres? A. Yes, sir.

Q. Will you tell us, please, the names of the X rated motion picture films that you have seen in the year 1970?

* * * * *

[27] Q. All right. The question was this. Can you tell us how many X rated films, motion picture films you have seen in the year 1970? A. No.

Q. Have you seen any? A. I don't know, really. I doubt if I have seen any X rated.

Q. Have you seen any films like "Teresa and [28] Isabelle"? A. No, sir.

Q. Have you seen "The Fox"? A. No, sir.

Q. Have you seen, "I Am Curious, Yellow"? A. I have personally not seen it. I have talked to people who have, yes, sir.

Q. All right. What type of film in the year 1970 have you seen; the ones that are rated GP, General Public? A. I don't look at the rating, sir. If the movie looks good, I go. I have seen very few movies this year. MASH comes to my mind as being one I saw. I don't even know what rating it is though.

Q. I think MASH, I think children under seventeen may go if they are with their parents?

MR. PIERSALL: MASH is an R movie.

MR. DIETZ: I don't know. I didn't see MASH, by the way.

Q. If you were asked to voice your opinion regarding community standards in depiction of sex, would you include in your answer depiction of sex in motion pictures? A. No, sir.

[29] Q. Because you are obviously not qualified; correct? A. That is your opinion, sir.

Q. I am asking you, if in your own mind you consider yourself qualified in that field? A. Which field, sir?

Q. To voice an opinion on the community standards of the depiction of sex in motion picture films. A. That's correct.

Q. That you are not qualified? A. That's correct, sir.

Q. All right. Now, you testified on direct examination that about a year and a half or two years ago there were three books involved. A. Magazines.

Q. Magazines, all right. What were those magazines? A. I don't remember at this time, sir. I am sure it is in the record some place. As a matter of fact, I can get them. They are in my office. Beg pardon. They were state's evidence. I don't have the magazines.

Q. Were those magazines purchased, to your knowledge, from an adult book store? [30] A. To the best of my knowledge, it was not an adult book store. However, it was in the adult section.

Q. Were those magazines what are generally considered to be hard core pornography? Did they actually depict sexual behavior; fellatio, cunnilingus? Did they depict feliatio? A. No. sir.

Q. Are you familiar with that word, sir? A. No, sir.

Q. You just answered a question regarding that word. How could you answer the question without knowing? A. I answered the question prefaced to those names, sir.

Q. Are you familiar with the word cunnilingus? A. No. sir.

Q. You just answered a question containing that word, did you not, sir? A. No, sir.

Q. You did not answer the question? A. I didn't answer the question if it contained that word because I

am not aware of the meaning of that word, sir. There were two words [31] that you used at the end of a question. I answered the question.

Q. Well, I don't have Webster's International Dictionary with me, but the last time I was called upon to define that word to a jury I read it from Webster's.

The word "fellatio" means oral sodomy or placing of the mouth upon the penis to cause an ejaculation. Does that explain the meaning of the word to you, sir? A. Which word are you referring to?

Q. Fellatio. A. Yes, sir.

Q. Cunninlingus is also sometimes considered oral sodomy. It is the placing of the mouth upon the vagina. Does that explain the word to you? A. Yes, sir.

Q. Now, my question to you, which you answered before but which I don't think you understood fully, was did the three magazines that you were involved with a year and a half or two years ago have any photographs of fellatio or cunnilingus or sexual intercourse? A. No, sir.

[32] Q. Have you ever been in an adult book store in Portsmouth? A. No, sir.

Q. You have never been in an adult book store in the city of Portsmouth? A. No, sir.

Q. Have you ever been in an adult book store in the city of Norfolk? A. No, sir.

Q. Have you ever been in an adult book store in any other city? A. Yes, sir.

Q. Where? A. Washington, D.C.

Q. And when were you in this book store in Washington, D.C.? Approximately? A. Approximately 1947.

Q. 1947? A. Yes, sir.

Q. Do you recognize that the mores of our society have changed since 1947, sir? A. Yes, sir.

Q. Now, in response to an interrogatory from Mr. Piersall, you said you have talked with people from different parts of the United States [33] outside the Portsmouth area. What persons have you spoken with outside the Portsmouth area, from different parts of the country, regarding this material that we have at issue here?

* * * * *

MR. DIETZ:

Q. Yes. A. Please restate your question. Have you spoken with anyone outside the Portsmouth area regarding the books that we have here in issue as far as their conforming to community standards of [34] any other city than Portsmouth, Virginia? A. Yes, sir.

Q. How many other people have you spoken with? A. I guess a dozen.

Let me rephrase that. A dozen people that came back, that were out of the city. How many people I have talked to from other parts of the country that are not residents of the city that I have talked to in groups, I have no idea.

Q. But these people who were from other states, did you show them any of the materials at issue in this case? A. They were not available.

Q. So the answer is no, is that correct, sir? A. Did I show them the material?

Q. Yes. A. The answer is no.

* * * * *

[37] THE COURT: I don't see why the fact that this man has not actually been in the local adult book stores disqualifies him completely on the subject.

In the case you are talking about, the federal case, I don't know anything about it, about the facts. Maybe the man hadn't done anything, hadn't been in the book store, or hadn't made any other investigation.

Mr. Holley testifies he has gone into this on the Chamber of Commerce level in this entire Tidewater area of our state, and he has reviewed it very thoroughly on several occasions and has gone into it with people here from all over the country in various types of meetings.

I am going to overrule your objection and allow Mr. Holley to testify as an expert.

MR. DIETZ: May I note an exception to Your [38] Honor's ruling?

* * * * *

DIRECT EXAMINATION (Resumed)

BY MR. PIERSALL:

Q. Mr. Holley, in examining these books that we have here today and we have had for some time, did you examine each book? A. Yes, sir.

THE COURT: Excuse me. There was one other thing I wanted to put in the record in determining Mr. Holley as an expert for this particular case, [39] the nature of the case, in his testimony.

I wanted to add that although he hasn't been in the particular store from which these books came, it is my understanding that he has been in other magazine and newspaper shops and newspaper shops that sold similar type magazines?

MR. DIETZ: I take issue with you, Your Honor. He did not testify to that.

THE COURT: Did you say you bought other magazines?

THE WITNESS: The question was had I ever been in an adult book store.

THE COURT: Yes, that's right. I think that is the name of the one here.

THE WITNESS: There are similar ones or this gentleman (Pointing to Mr. Dietz) wouldn't be in

business, but the title, adult book store, I took it to be for adults only and had only this type of magazine.

The only one I was ever in was in Washington, D.C. in 1947, I believe I said.

Your Honor is correct. I have been in [40] other book stores, magazine stores that were not described as an adult book store.

MR. DIETZ: But had you ever been in a book store that sold magazines comparable to the magazines that we have at issue here? A. No, sir.

MR. DIETZ: That's the point; and your answer to that question is no; correct? A. Yes, sir.

MR. DIETZ: Your Honor, I wish you would take that and reconsider your ruling.

THE COURT: Let me hear from Commonwealth.

MR. PIERSALL: Did you say exclusively this kind of book?

MR. DIETZ: I didn't say exclusively that.

BY MR. PIERSALL:

Q. Have you been in books stores where these books were sold along with other kinds of books, newspapers, magazines? A. The magazine stores and book stores that [41] I have been in have never sold anything as bad as that.

MR. DIETZ: I object to the words "as bad".

THE WITNESS: That is my opinion, sir.

MR. DIETZ: That gives the background. I ask Your Honor to reconsider your decision in light of this qualification or lack of qualification that has just been made clear to the Court.

MR. PIERSALL: Judge, I don't think that makes any difference insofar as his qualifications are concerned.

THE COURT: Frankly, I can't see the fact that he hasn't gone into these stores of itself would disqualify

him as being an expert on a subject which he has made a study of.

MR. DIETZ: The point, Your Honor, and I don't mean to argue with Your Honor, but the point is if he hadn't made a study of it, he couldn't have made a study of it unless he had gone to different places and had seen–

THE COURT: If the material had been [42] brought to him by somebody else, what difference does it make? The fact he didn't walk through the door and by the magazines wouldn't make any difference, I wouldn't think.

Maybe I misunderstood him but I understood he had similar material before him, and that is what you all studied? A. Yes, sir.

THE COURT: How did you obtain the material?

THE WITNESS: A year and a half ago I obtained it through the Commonwealth's Attorney's office. Prior to that, some five years ago, the members of the committee purchased it from these different locations. Some of these members may have gone into an adult book store and purchased them. I would have to go back and look at each individual one's identification to see where they were purchased.

The question was posed was I ever in one, and my answer was no.

THE COURT: And you, being Chairman of that committee, you worked with that material?

[43] THE WITNESS: Yes, sir.

THE COURT: I overrule your objection.

MR. DIETZ: Over our objection, yes, sir.

BY MR. PIERSALL:

Q. You looked at each one of the books here? A. Yes, sir.

Q. Where did you look at them? A. In the clerk's office, I believe, in the old court house.

Q. Did you make more than one trip to that location? A. Yes, sir.

Q. Did you spend time looking at these books? A. Yes, sir.

Q. Did you make some notes insofar as what these books contained and your feelings about them? A. Yes, sir.

Q. Did you find any of the books which, in your opinion, well, let me rephrase that. Did you find any books which, in your opinion, would not be patently offensive in that investigation that–

MR. DIETZ: I object to the leading question.

MR. PIERSALL: Well, all right.

THE COURT: Rephrase your question.

* * * * *

[44] Q. Well, what is your opinion whether or not these books are patently offensive and that they violated the community standard in the display and portrayal of sex? A. The majority of them–

MR. DIETZ: I object to the question. Unless we can have some sort of an understanding that your Supreme Court of Appeals of Virginia will recognize that, I object to all questions along these lines put to this witness.

THE COURT: What is your objection?

MR. DIETZ: That he is not qualified to answer this question.

THE COURT: You have already noted your exception to his testifying at all.

MR. DIETZ: Yes, sir.

THE COURT: Because your position is that he is not an expert. I have ruled that in this particular instance and on this particular subject matter he is qualified to testify.

* * * * *

[45] MR. DIETZ: And the Supreme Court of Appeals would understand that I am objecting to each and every question and Your Honor is overruling my objection and I am excepting.

THE COURT: I can't overrule questions you might object to and I haven't heard. I am saying you can make your objection and later in the record if there is some question that you think is objectionable, then your exception would have been noted.

MR. DIETZ: I make my objection to this question, sir.

THE COURT: All right.

BY MR. PIERSALL:

Q. Do you remember the last question? A. No, sir.

MR. PIERSALL: Read the question, please.

COURT REPORTER: "Well, what is your opinion whether or not these books are patently offensive and that they violated the community standard in the display and portrayal of sex?

MR. PIERSALL:

[46] Q. What is your answer? A. The majority of the books did not meet the community standards.

Q. You say the majority. Which ones, in your opinion, did not violate community standards? A. There were some written in a foreign language which I couldn't interpret. I noted those.

There was one which I felt was not obscene, called "Continental Spectator," Volume 4. It is Number 9. I believe it is "Continental Spectator," Volume 4, Number 9; and three others I have marked as "Questionable" in my mind: "Ectasy," Volume 1, Number 11, "Daring Films," Volume 3, Number 5, "Black Silk Stockings, "Volume 5, Number 3."

The balance of the magazines that were in question I felt were, in my opinion, did not meet the community standard.

Q. All right. Did you find that any of these books, taken as a whole—let me ask you this. I will rephrase the question.

Did you find that these books, taken as a whole, appealed to the prurient interest in sex? [47] A. Yes, sir.

MR. DIETZ: I object. I don't think he is qualified.

THE COURT: I will let him testify as an expert on the subject. I think it is all tied together.

BY MR. PIERSALL:

Q. Did you find that any of these books, well, what is your opinion as to whether or not these books contained any redeeming social value?

MR. DIETZ: I object to that.

THE COURT: I overrule the objection.

THE WITNESS: In my opinion, the majority of them did not have any redeeming value, redeeming social value.

Q. The ones you noted, were there any others which, in your opinion, may have had some redeeming social value? A. Yes, sir. There were a group of them that had an insert in the middle that could be determined as a redeeming value, but the balance of the book was, in my opinion, below community standards.

Q. Do you know which ones you thought did have some redeeming social value? [48] A. Not without some study, sir.

Q. You don't recall the ones? A. I would have to check. I think it is those three that were mentioned that were questionable.

Q. Could you check it for us, please? A. I would have to look through the magazines.

THE COURT: Was it "Continental Spectator?

THE WITNESS: No, sir. That is the one that has want ads for all kinds of people, "Ectasy," "Daring Films," "Black Silk Stockings."

BY MR. PIERSALL:

Q. You think those were the three? A. I think those were the three that had the inserts that could be determined to contain some redeeming social value.

Q. Any others? A. No, sir. I will stand corrected on that. Frankly, this was done in July and my notes are a little bit cold.

Q. You say you stand corrected. What do you mean by that? A. That those are the three books in question as to those inserts. Do you want me to look for them?

Q. I don't know. I was going to see if I could find one of them right away. [49] A. "Daring Films," Volume 3, Number 5. This one you handed me is not the one. It was another one with the want ads in it.

MR. DIETZ: May the record indicate what the witness was referring to when he said, "This is not one of them"?

MR. PIERSALL: "Ectasy," Volume 1, Number 11.

THE WITNESS: It is one I questioned whether it might have redeeming social value.

BY MR. PIERSALL:

Q. You say it might have or it doesn't have? A. I questioned whether it may have redeeming social value.

THE COURT: Did you ever find the books you were looking for?

MR. PIERSALL: No, sir, I didn't. I, frankly, don't know how to do it in a practical way.

THE COURT: You have names of them written down?

MR. PIERSALL: Yes, sir.

THE WITNESS: "Continental Spectator" is one in my mind that is not obscene.

[50] BY MR. PIERSALL:

Q. And the other is "Ectasy," "Daring Films," and "Black Silk Stockings," which you indicated you thought may have some redeeming social value, right?

Is that what you said? A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. DIETZ:

* * * * *

[51] Q. Mr. Holley, would you define for the Court what you meant when you said that these books would not appeal to a prurient interest in sex? A. I said they would not. Are you talking about the exceptions I made?

Q. Yes, or that they would appeal to the prurient interest in sex? What do you mean by that? A. They would appeal to those who enjoyed lewd matter, depicting sex in a very objectionable way.

Q. That is your answer, sir? A. Yes, sir.

Q. All right. Will you define, sir, what you meant when you said that these magazines or, I think you said the majority of these magazines, went beyond community standards? What is the community standard? A. What is the community standard?

Q. What is the community standard you had in mind that was supposedly exceeded? A. In my opinion, the community standard is the depiction of nudity, both male and female, in various suggestive and lewd positions, which appears throughout most of the magazines.

[52] Q. Then I understand you, sir, if a book contains depictions of nudity, male and– A. Not just nudity, no, sir; suggestive positions.

Q. All right. Suggestive positions. Suggestive of what? A. Of sexual intercourse, sodomy, any of the items we are referring to.

Q. In any of these magazines did you see, sir, any photographs of fellatio? A. Define fellatio.

Q. I have before. A. Define it again.

MR. PIERSALL: I don't think that is so funny, Judge. I don't know what it means, either. I don't think it is of

any significance. We have looked at these books. I am sure, sir, that Your Honor looked at them.

I think what this man said, briefly and precisely, is that these books contained pictures of people nude in suggestive poses. I don't know, but he is suggesting sex and sodomy; whether you call it one thing or another.

[53] THE COURT: Mr. Dietz explained the meaning of the word a little while ago. Why keep using the same words? Why not use layman's language, if you want to? Either way is all right.

BY MR. DIETZ:

Q. Did you see any photographs of someone's penis in someone else's mouth? A. Quite suggestive of this, yes, sir.

Q. Suggestive, but you didn't see any photographs of a penis in someone's mouth? A. My studies show that the community standard objects to this being as closely suggestive as it was in these magazines.

Q. Mr. Holley, are you familiar with the term "hard core pornography"? A. Yes, sir.

A. Would you define that term for me, please? A. The actual showing of people committing the act of sodomy and the act of sexual intercourse and all of the actions which go along with the whole subject.

Q. Do you consider the magazines at issue here today as hard core pornography? A. No, sir.

[54] Q. So you didn't see any actual depiction of sodomy or sexual intercourse in these magazines? A. I answered that already, sir.

Q. What was your answer? I didn't catch it the first time. A. I said there were no pictures of the actual act. However, there were strong indications and suggestions that this was happening.

Q. Was happening, was about to happen or had happened? A. You can't determine that from a still.

Q. So what you are saying then it is left to your imagination? A. Yes, sir.

Q. And in your imagination, these acts were transpiring? Correct? A. No, sir.

THE COURT: What did you say?

THE WITNESS: I said no, sir. I am testifying as to a community standard, my understanding, Judge, and the pictures that were depicted did not meet the community standard.

This is my statement. I can't draw a conclusion of what has happened or about to happen.

BY MR. DIETZ:

[55] Q. And what was the community standard? A. I would say the community standard depends on what is actually presented, just as in my mind the "Continental Spectator" would not be pornography or obscene, according to the community standards.

I cannot now do I believe anybody can say in black and white this particular item, I beg pardon, this, in black and white words, is what a community standard is.

Q. You can't describe it but you know it when you see it; is that it? A. I know what is acceptable and what is not acceptable as far as community standard is concerned.

Q. Can you describe to the Court what is acceptable? A. I have already done that, sir.

* * * * *

[56] MR. DIETZ: If he said this exceeds community standards, I want him to tell me what this exceeds.

MR. PIERSALL: We object to this, Judge.

THE COURT: Mr. Holley hasn't been given an opportunity to tell us whether he can answer the question or not. Maybe he can define it.

Do you feel that you can define the community standard as you understand it after your studies?

[57] THE WITNESS: I guess I could put it in words, Your Honor. It is the publication in any form or media of nude and lewd actions whether on public display or not, depicting any of the sexual acts natural or unnatural sexual acts.

It would also include the display of any male or female sexual organs that were exaggerated; the display of nudity in and by itself would not be objectionable in many cases, but the display of the sexual organs, exaggeration of such, would be; if this is what you are looking for.

THE COURT: Mr. Dietz had asked you if you could define community standards as you understood it.

MR. DIETZ: I have no further questions, sir.

REDIRECT EXAMINATION

BY MR. PIERSALL:

Q. Would you say nudity in and of itself would violate the community standard? A. No, sir.

Q. Would you say nude males and females in the same picture would violate the community standard as you know it; just pictured together in one picture? [58] A. I would say no, sir. Thinking of nudes, legitimate nudists come on any type magazines.

Q. Did these pictures show more than that? A. Yes, sir.

Q. Did the pictures in these books show male and female nude together in positions or poses which suggested sexual intercourse? A. Yes, sir.

Q. Did they show them in poses which suggested sodomy? A. Yes, sir.

Q. Which means that with the male or the female placing his mouth against the genitals of the other party? A. Yes, sir.

Q. And is that what you define as a violation of the community standard? A. Yes, sir.

* * * * *

[59] DR. DONALD LEE MINGIONE, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PIERSALL:

Q. Doctor, state your name and profession. A. Donald Lee Mingione, physician, specializing in the field of psychiatry.

Q. Dr. Mingione, where do you practice your profession? A. In the City of Portsmouth.

Q. What training have you had leading up to your taking up this profession? A. I received my Doctor of Medicine at Creighton University, University of Nebraska, and I did my residency and internship in Jersey City, New Jersey, and at the Fellowship of Psychiatrists at the Institute of Living, Hartford, Connecticut.

Q. Are you now presently a member of any professional associations? A. American Psychiatric Association and a member of the Society for Study of Social Issues, [60] Neuro-Psychiatric Society of Virginia, and the Tidewater Psychiatric Society.

Q. Prior to your practice at this time have you taught in any schools? A. I was Assistant Professor Psychology at the University of Hartford and Clinical Assistant Psychologist at the College of Medicine.

Q. Do you occupy any positions within your profession at this time? A. I am President of the General Medical Staff at the General Hospital.

Q. Here in Portsmouth? A. Yes, sir.

Q. How long have you been practicing psychiatry in Portsmouth? A. Nine years.

Q. Pursuant to a request of mine did you examine certain books and magazines? A. I did.

Q. These were examined at your office, right? A. Yes.

Q. Do you recall the number of them? A. It was a very large number; in excess of three hundred and fifty volumes.

Q. Did you look at each book? [61] A. I did.

Q. How long have you been in the City of Portsmouth, Doctor? A. Approximately nine and a half years.

Q. Were you in the military service at all? A. I was a lieutenant-commander in the United States Navy.

Q. How long were you there? A. Two years.

Q. Prior to coming to the City of Portsmouth, where had you lived? A. New Jersey, Connecticut, Nebraska, and the State of Virginia.

Q. All right. I believe you have discussed with me the issues involved in this trial, have you not? A. I have.

Q. Insofar as these books are concerned, did you look at these books with any particular purpose in mind? A. With the view as to an attempt to give an opinion as to the response or the attitude of this community as to the nature of the material contained therein.

Q. All right. Are you a member of any clubs [62] or organizations other than professional ones in this area? A. Yes, sir.

Q. And do you serve on any boards in the community? A. Yes. I am a member of Kiwanis and of the Elks Lodge. Is this the type you mean?

Q. Yes, sir. A. I served on the Suicide Prevention Service Board. I worked with the United Community Fund, Kirk Cone Rehabilitation Center, St. Mary's Infant Home, United States Public Health Service Hospital in Norfolk.

Several others. Do you want me to continue?

Q. No, sir. I think that's fine. I wanted to establish your activities within the community in which you live.

Would you say that this community is a Navy oriented community? A. Somewhat.

Q. Is a large segment of our population Navy? A. Yes, sir.

Q. In fact, that they are members of the Navy or families of the Navy or ex-members of the Navy? A. Yes, sir.

[63] Q. And thus they come from all over the country, right? A. Yes.

Q. As a matter of fact, you came here with the Navy? A. That's correct.

Q. Now, I believe when you looked at these books, I asked you to determine whether or not, if you could, whether or not these books appeal to the prurient interest in sex and did you look at these books with that in mind? A. Yes, I did.

Q. Can you give us what your definition is of prurient interest in sex? A. Well, I think I would say that the intent is primarily to appeal to sexual arousement.

* * * * *

THE COURT: All right, Doctor. Will you [64] answer the question?

THE WITNESS: I will attempt to. I would say the appeal would be to—I think one definition leads to another, but to the more animalistic aspects and mechanical aspects of sexual behavior.

BY MR. PIERSALL:

Q. Animalistic and mechanical, is that right? A. Yes.

Q. Of course, you are not suggesting that sex in and of itself is bad at all? A. No way at all.

Q. Did you find that any of these books appealed to prurient interest in sex? A. I would say that the overwhelming majority, if not all. I have difficulty in recalling the specific number but I would say their appeal was not to anything other than I would view a prurient interest in sexual matters.

Q. All right. Let me ask you this. Did I ask you to determine whether or not any of these books would have any redeeming social value insofar as your experience and knowledge would lead you to make a determination?

MR. DIETZ: I object.

* * * * *

[67] BY MR. PIERSALL:

Q. Let me ask you this, Doctor. In your professional dealings with patients of yours, would it be necessary for you to talk to these people and discuss with them and aid them in [68] determining certain values which might be called social values, if I make myself clear? Would social values in any way be involved in your work? A. I think I mentioned before that one definition leads only to attempting to re-define others.

I am sorry, Mr. Piersall, I cannot grasp specifically what you might wish me to reply to.

Q. Yes. Well, it is a problem.

THE COURT: Let me ask you this, Doctor. What is your understanding of the meaning of redeeming social values?

THE WITNESS: That it would exert a positive effect for appeal to higher, more dignified, more human aspects of behavior versus appealing to behavior which would tend to demean and undermine human dignity.

THE COURT: All right.

MR. PIERSALL: I am thinking of something, Judge. I don't know whether it would be in line with what you are driving at or not, and you can tell me, maybe, Doctor.

BY MR. PIERSALL:

Q. When we are talking about social value, would anti-social value, well, would anti-social behavioral patterns be the reverse of social value? Would [69] that be involved in any way? I know you deal with people having what I have heard described as anti-social behavioral patterns. A. We might try this. Some of the people with whom I deal are in response to their own emotional behavior in conflict with society.

Q. And do you in your treatment of these people, diagnoses of these individuals, have to deal with definitions of social values and try to re-establish certain social values with these people? A. Trying to re-establish their more comfortable adaptation to society, the society in which they would find themselves in residence, I would say.

Q. If I were to ask you what redeeming social values would be, well, I will get myself into trouble with words here. Let me ask you this. What would you mean if you made the statement that these or any books are without redeeming social value? What would you mean by that?

MR. DIETZ: I object to that hypothetical question.

THE COURT: I overrule the objection.

MR. DIETZ: The doctor hasn't made that statement. Nothing in the evidence on which [70] he could base that hypothetical question.

MR. PIERSALL: I am asking him what is his definition of redeeming social values.

MR. DIETZ: I object to that.

THE COURT: All right. I thought I asked him that question a little while ago.

MR. DIETZ: You did, Your Honor.

THE COURT: I thought I did.

MR. PIERSALL: I think we have gone far enough to introduce this man.

THE COURT: The main thing of Dr. Mingione is the redeeming social value question?

MR. PIERSALL: Yes, sir.

THE COURT: Go ahead. Follow through.

BY MR. PIERSALL:

Q. Doctor, did you find any of these books to contain redeeming social value; even a modicum of social value?

MR. DIETZ: May I enter an objection?

THE COURT: All right.

A. In my opinion, they did not possess any redeeming social values.

* * * * *

[71] CROSS EXAMINATION

EXAMINED BY MR. DIETZ:

* * * * *

Q. Doctor, would you be good enough, sir, to define the term prurient interest in sex as you have used it here today? A. That its appeal is primarily to sexual arousal per se with no attempt to appeal beyond that.

Q. All right, sir, and have you in the year 1970 had the opportunity to go to any motion pictures, see any movies? A. I have not.

Q. When was the last time that you attended a motion picture theatre to see a movie? A. I would say the latter part of 1969, probably.

Q. All right. Then may I make the question in the year 1969 and up to the present time 1970, have you had the opportunity to attend any movies that were X rated or R rated? [72] A. No.

MR. PIERSALL: He already testified he hadn't been to a movie.

MR. DIETZ: He said in 1969.

THE COURT: He said at the end of 1969.

MR. DIETZ:

Q. Then, Doctor, you would not be aware of any of the prurient interest appeal of any of the movies that are showing all over the country that are X rated or R rated, would you, sir? A. I am not quite sure I understand what you mean.

Q. Were you aware that the R movies, motion pictures that are on display to the public for the price of admission, which are X rated or R, Restricted, for adult only, that have sexual themes in them? A. Yes, I was aware that such existed.

Q. But you have not seen any? A. I have not.

Q. You are not aware of the extent of prurient appeal contained in those sexual scenes? A. I am not.

Q. All right. Would you say, Doctor, that the depiction of a love affair of the lesbian type, [73] a love affair of the lesbian type as was shown in "Teresa and Isabelle" and the movie, "The Killing of Sister George," and as depicted–

* * * * *

THE COURT: Well, if you haven't seen the movie. I don't see how the doctor could hardly answer the question.

MR. PIERSALL: My point is–

THE COURT: You object to his even talking about the movies?

MR. PIERSALL: Yes, sir. They are not [74] relevant to this man's testimony.

* * * * *

[80] MR. DIETZ: Mr. Holley's description of the book was "not obscene."

MR. PIERSALL: That is a matter for the Court to decide.

MR. DIETZ: I understand but that is the way Mr. Holley described it.

THE COURT: Regardless of what Mr. Holley said, the doctor has testified to his viewpoint on the redeeming social value and that one point alone when he said the vast [81] majority, if not all, in his statement, had no redeeming social value.

MR. DIETZ:

Q. That is your testimony, is it not, Doctor? A. Yes, sir.

* * * * *

RICHARD MESSENGER, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. State your name, please, A. Richard Messenger.

Q. Where are you employed? What is your line of business? A. I am owner of Messenger Printing Company.

Q. Is that a business here in the City of Portsmouth? A. Yes, sir.

[82] Q. Where do you live? A. The address?

Q. Are you a resident of the City of Portsmouth? A. Yes, sir.

Q. How long have you lived in the City of Portsmouth? A. All my life.

Q. How old are you? A. Forty-three.

Q. Were you educated here? A. Most of my education.

Q. The Messenger Printing Company, how old is that business? A. Almost twenty years.

Q. Twenty years old. Were you the founder of it? A. Yes.

Q. Are you married? A. No.

Q. I ask you to look at the box that we have here today. Well, I will ask you if you have looked at the boxes we have here today? A. Yes, sir.

Q. Have you looked at each one of them? [83] A. Yes; all that were in the office at the time.

* * * * *

Q. Do you have any experience in printing materials for other than the locality here? A. Yes.

Q. In what way? A. We do quite a large amount of government printing and we do a lot of work for offices whose home offices are not in this area but other states.

Q. What type of material are you engaged in printing? A. Catalogs, magazines, newspapers, commercials.

Q. Do you receive from time to time information and bulletins insofar as what you should and should not print? A. Yes, sir.

Q. In the field of obscenity? A. Yes.

Q. And have you attended any seminars or schools in this field? [84] A. Not as seminars or schools, but we have had meetings, printers, publishers.

Q. Insofar as the printing of obscene material? Was that the subject of those discussions? A. Obscenity, illegality of matters such as copying movies; things like that.

Q. And you are an auxiliary police officer, also? A. Yes, sir.

Q. How long have you been an auxiliary police officer? A. I will guess and say four years. I am not really sure as to the date.

Q. What is your rank? A. Captain.

Q. Are there any higher auxiliary police officers, higher ranking? A. No, sir.

* * * * *

[85] Q. And insofar as your activities in the City of Portsmouth are concerned, have you always lived in Portsmouth? Have you gone out of the city? A. The only time I was out was when I was in service and in Williamsburg at school and Charlottesville.

Q. How long were you in the service? A. On active duty, two years.

Q. In looking at these books, what was your purpose in looking at them? What did I ask you to do? A. You requested me to look at them and see if I thought they contained any redeeming social value or did they appeal to, I don't know whether you said my prurient interests or to the prurient interests.

[86] Q. And did you look at them with that in mind? A. Yes, I did.

Q. Do you know what the prurient interest in sex is? What is your definition of that term? A. Prurient interest would be an arousal of your sexual mores.

Q. Did these books in any way, insofar as you viewed them, appeal to the prurient interest in sex? A. Several of them most definitely did.

Q. Would you say that generally they did or generally they did not?

MR. DIETZ: I object to that leading question. He said "several of them."

MR. PIERSALL: "Several" might be all but one or just one or two.

A. Well, I think I can give you a more intelligent answer.

THE COURT: All right.

A. Several particular makers of the books, I didn't count the volumes of each, but several were definitely, in my opinion, obscene and did appeal to prurient interests.

MR. PIERSALL:

[87] Q. Did you say seven? A. Several titles; title X. I didn't count the number under each title.

Q. Do you have them written down? A. Yes.

Q. What were they? A. One is "Blazing Films."

Q.You say there were more than one? A. I don't know how many copies there were of each particular title. There could be ten or fifteen or three. I don't remember the exact number of each title.

MR. DIETZ: I didn't get that. What was the name? A. "Blazing Films."

MR. DIETZ: That is not one of the books listed on my list, Your Honor. A. That is one of them in those boxes.

MR. DIETZ: Excuse me. You are right. A. "Seekers." "Quickie." Why don't I read them all to you and you won't have to go through them one by one?

"Pendulum," "Private Films," "Over 21," and "Heads Up."

MR. PIERSALL:

[88] Q. Those were books you thought were particularly obscene? A. Yes, sir.

Q. You say they appealed to the prurient interest? A. Yes.

* * * * *

Q. Can you tell me what your definition of redeeming value is? Redeeming social value? A. Anything that would be beneficial, helpful, or in any way or would in any way benefit society.

Q. Did you find any of these books to have [89] redeeming social value insofar as that definition is

concerned? A. Some of them for an art student would definitely have redeeming social value.

Q. Like what, for instance? A. In my opinion, the female body is a beautiful thing when viewed as a normal beautiful body. To answer your question, some that I saw had certain parts of the body accented by motion or unnatural poses that, to me, were disgusting; but as an art student they would have redeeming values for figure studies.

Q. Those books which contained pictures of men and women together in poses suggesting sexual intercourse, copulation, or some form of sodomy, are you describing those as having redeeming features?

MR. DIETZ: I object to the leading question. A. I wasn't referring to that particular book at all.

MR. PIERSALL:

Q. Did some of these books have pictures like that? A. Yes.

Q. Would you say most of them had pictures like that? [90] A. Yes.

Q. Would you say most of them had pictures that–

* * * * *

Q. How many books had pictures like that? A. I can't give you a count. I don't remember the number. I would say the majority of the books were not obscene or did not appeal or would arouse the prurient interest. When I say the majority, more than half were not.

Q. Were not what? A. Obscene, in my opinion.

Q. You know the definition of obscenity? A. I said, "In my opinion."

Q. I am not asking you your opinion of obscenity. A. I am lost.

* * * * *

[92] Q. Did these books have pictures of people in poses suggesting sexual intercourse? A. Yes, sir; most definitely.

Q. Or suggesting sodomy? A. Yes, sir.

Q. Did they have pictures of the male or female genital organs as a central or focal point of the picture? A. Yes; most definitely.

Q. Were the organs accentuated or extended in any way? A. Yes.

Q. And would you say that that was an art work? A. No.

Q. I am showing you now "Tootsie," Collector's issue No. 1. These are the types of pictures I was asking about, where the female organ is the focal point. Would you describe that book as having the female organ as the focal point of the picture–

MR. DIETZ: I object to leading questions.

THE COURT: Ask him how he would describe it.

MR. PIERSALL:

Q. How would you describe it? [93] A. The book has twenty-six pictures. Twenty-four of them accent directly on the female genitalia.

Q. Would you say that that is an art work? A. No.

Q. I believe that's all. Answer Mr. Dietz.

MR. DIETZ: Your Honor, I will look through these books and see if I can find the issues of "Exciting," which was listed on the list.

THE COURT: Very well. Mr. Dietz, Mr. Messenger said it was in the box on the table.

MR. DIETZ: "Exciting" is over here? Oh, yes. That's fine; beautiful.

CROSS EXAMINATION

EXAMINED BY MR. DIETZ:

Q. Mr. Messenger, I show you one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen,

fourteen, fifteen issues of a magazine named "Exciting" and ask you if you would peruse those books, please. A. Yes.

Q. Mr. Messenger, you had the opportunity to view all of the issues of "Exciting." Those magazines which you have just viewed, is not the focus of the camera upon the genital area there [94] of the female involved? A. Not all of them.

Q. Not all of them? Some of them? A. Yes.

Q. In each magazine, is there not some photograph, generally the center fold, that has the emphasis upon the vagina of the female involved? A. I will answer yes.

Q. And when you were testifying earlier regarding the statement of the appeal to the prurient interest, you meant the appeal to your prurient interest? A. No, sir.

Q. You are shaking your head no? The record doesn't indicate a shake of the head. A. I said, "No, sir."

Q. Whose prurient interest were you indicating it would appeal to? A. Are we referring to these books?

Q. No. We are referring to your testimony regarding appealing to prurient interests. A. I should assume that the average young person after reaching the age of puberty and in that age zone, it would certainly be an arousal [95] for them.

Q. You say an average young person who has attained puberty– A. Already reached puberty.

Q. You attain puberty at twelve to fourteen, is that true, sir? A. In that area.

Q. And that is the person that you had in mind who would have a prurient arousal or prurient interest appeal? A. Not necessarily. That is one you asked me to name. I would say any average young male or female could be affected by them. Whether they would or not, I couldn't tell you.

Q. Any average young male or female. You mean any average young person? A. Yes.

Q. All right. You mean someone above the age of puberty; say fifteen, sixteen, seventeen? A. May I use the words "formative years?" That would be up to the age of eighteen or nineteen.

Q. It wouldn't go past nineteen? A. It could.

Q. I am trying to find out what you had in your own mind, sir, when you testified. [96] A. If you want me to generalize, you would force me to say up through twenty-one.

Q. All right. Up through twenty-one? In your opinion, sir, as you have been permitted to voice it in this case, these magazines would appeal then to prurient interests, say someone under twenty-one years of age; is that correct, sir? A. Yes, sir.

Q. Now, Mr. Messenger, were you aware that only adults were permitted into the Village Book Store where these books were seized or taken? A. Anyone over the age of eighteen.

Q. Anyone over the age of twenty-one, sir; that is adult. A. Agreed.

Q. Were you aware of that? A. No.

* * * * *

[98] Q. Mr. Messenger, you said you had received bulletins of what not to print? A. We received informative bulletins.

Q. On what not to print? A. That's right.

Q. Who disseminates these bulletins? A. There are several organizations in the printing industry and one of them is the National Association of Printers and Lithographers; various organizations like that who send these out.

Q. And they give you bulletins and tell you what is or is not obscene, in their opinion? A. No, sir, I didn't say that.

Q. Tell us what the bulletins contain. A. They contain information as to what is reproducible without repercussion. That could be legal for community standards.

Q. It does not attempt to limit obscenity? A. No.

Q. And that is what you used as the basis of forming your conclusions upon which you base your answers, your prior answers? A. No.

Q. What did you use as the basis for your stating before as to community standards and [99] redeeming values, et cetera, prurient interests? A. I am afraid I don't understand your question.

Q. Upon what did you base your answers that you gave in response to questions from Mr. Piersall that certain of these books would appeal to prurient interests or would not appeal to prurient interests, that certain of the books went beyond community standards or were without redeeming social value? A. In my business I have to have a fairly good knowledge of art because of the type of business.

In the courses that I have taken, various studies, and in my formal education and living in the neighborhood, this area, my whole life is what I base my opinions on.

Q. To inquire into your background, have you ever read Henry Miller's "Tropic of Cancer" or "Tropic of Capricorn?" A. I read part of one. I don't know which one it was.

Q. Did you not read the entire book? A. No.

Q. Did you ever read John Clellan's "Memoirs [100] of a Woman of Pleasure?" A. No, sir.

Q. Sometimes referred to as "The Autobiography of Fanny Hill"? A. Yes.

Q. In full or in part? A. In college, and in full.

* * * * *

Q. What year was that? It was in college? A. It has been a long time.

Q. It would be in 1949 or 1950? A. In that range somewhere.

Q. Mr. Messenger, have you ever been in the local adult book store? The store on High Street?

THE COURT: You mean the Village Book Store?

A. I only looked in. I didn't go through [101] the door.

MR. DIETZ:

Q. You mean you only looked from the outside? A. Yes.

Q. Have you been in an adult book store in Norfolk? A. Yes.

Q. Or Newport News? A. No; Norfolk.

Q. You have been in that store? A. Yes.

Q. Did you ever buy anything there? A. No.

Q. You just looked around? A. I was in the store.

Q. Did you see magazines comparable to the magazines we have at issue here for sale there? A. Yes, sir.

Q. Have you ever been in an adult book store anywhere else? A. No.

Q. When were you in the adult book store in Norfolk, approximately? Was it 1970, this year? A. No. Well, it could have been the last of [102] 1969 or the first of 1970. I don't remember exactly.

Q. Within a year? A. Within a year.

* * * * *

[104] MR. DIETZ: Before you recieve them, may I interpose an objection?

THE COURT: Yes, sir.

MR. DIETZ: My objection is to the entire group contained in the four cartons on the table and the objection is that these books were obtained unlawfully and illegally in that the Commonwealth's Attorney had issued a subpoena duces tecum for Mr. Frank Collier who is an employee of the Village Book Store to appear in court with these books and that subpoena that was issued when there was no pending proceeding while in this court.

The proceeding was not filed until after the subpoena was issued and although I was not present, I understand Mr. Collier appeared reluctantly with the books and intended at that time to exercise his rights under the Constitution of the United States and the 5th Amendment and to refuse to deliver the books but that while Mr. Collier was taken into one court room, the books were then taken [105] by some court official or bailiff or sheriff, I don't know, I wasn't present, but the point I am trying to make clear in the record is that they were taken from Mr. Collier against his will; they were not voluntarily submitted.

They were only brought to the court building pursuant to the commands of the subpoena duces tecum which was issued when there was not any pending court action, and, therefore, we object to their admission in evidence. That is the ground.

* * * * *

[106] THE COURT: Yes. He told me then he was leaving the firm he was with within a week and going with the City Attorney's office in Norfolk, and he said something about the box that morning and the books were brought to court as they should have been and were impounded at that time, so I overrule your [107] motion, Mr. Dietz. Note your exception.

MR. DIETZ: Yes, sir. Thank you. You overruled my objection. May I have an exception to Your Honor's ruling?

THE COURT: Yes, sir. The books in Box No. 1 will be received and admitted into evidence and identified as "Commonwealth's Exhibit No. I."

Now, mark another box No. 2. The magazines therein will be admitted into evidence and identified as "Commonwealth's Exhibit No. 2."

There is a third box. Mark that, of course, as No. 3, and Box No. 3 containing magazines will be received and admitted into evidence and identified as "Commonwealth's Exhibit No. 3" and Box No. 4 will be received and admitted into evidence as "Commonwealth's Exhibit No. 4."

MR. PIERSALL: I believe that's it. We rest.

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[108] MR. DIETZ: At this time, on behalf of the Respondent, I move the Court to strike all the evidence. I believe that is the terms of the customary motion. Some places they call it a motion for a judgment, rather a motion for judgment or in some places they call it a motion for directive verdict.

We have no jury but I am sure Your Honor understands the gist of what my motion is and the points that I would raise is that the state, the Commonwealth, has not made our a prima facie case and that we have not had any testimony regarding the obscenity of the books, and, Your Honor should, as a matter of law, rule that the books are not obscene.

As a matter of law and as a matter of fact, Your Honor should rule that the books are not obscene.

Testimony has been introduced on behalf of the Commonwealth to the effect that some of the books have redeeming social value.

I know Your Honor is very familiar with the definition of obscenity which we have in the Supreme Court, and there has been no showing that these books are utterly without [109] redeeming social value and that the books did not conform with so-called contemporary standards, which I think should be a nationwide community standard and not just a standard for the City of Portsmouth, and, therefore, Your Honor should find all the books constitutionally protected by the first amendment of the Constitution of the United States of America.

* * * * *

[110] THE COURT: I think Commonwealth has made out a sufficient case. If we had a jury, it would go to the jury. I overrule your motion to strike.

* * * * *

[111] DR. WILBUR A. HAMMAN, a witness called in behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. State your name and your address, please. A. Dr. Wilbur A. Hamman. I live in Arlington, Virginia.

Q. And you are a Doctor of Medicine, are you not, sir? A. That is correct.

Q. And you specialize in psychiatry? A. That is correct.

Q. Doctor, would you state what institutions of higher learning you attended and what degrees you hold to have obtained your Doctor of Medicine? A. I graduated from Chicago School of Medicine in 1955. After a year's rotating internship I did my first year of psychiatric

residency at Crownsville Hospital in Maryland and I did my last two years in psychiatric residency at Central State Hospital, Petersburg, Virginia.

[112] For half the time I was at Crownsville and the entire time I was at Central State Hospital I was Chief of Maximum Service, and in that capacity was in charge of the evaluation of all patients sent to that hospital by the courts in Virginia for pre-trial observation.

Following that time, I went to the Washington metropolitan area. I have been on the staff of St. Elizabeth's Hospital. I have been in private practice since 1961.

Q. While you were on the staff at St. Elizabeth's Hospital, was there a period of time that you were assigned to the criminally insane division, so to speak? A. Yes. I was assigned there up until about a year and a half ago. First I was a staff member. Then I was a training officer. As training officer, I was in charge of the supervision of resident psychiatrists, that is, doctors who were taking the specialized training in psychiatry, and my sub-speciality was forensic psychiatry.

I supervised their evaluation of criminal patients and I conducted seminars in forensic psychiatry or psychiatry and the law.

Q. Doctor, are you also engaged in the [113] private practice of medicine, specializing in psychiatry? A. Yes.

Q. In which state or states? A. I am licensed in Maryland and Virginia.

Q. Have you ever appeared in any courts, federal or state, as a witness and been qualified as an expert witness? A. I have appeared in the state courts of Maryland and Virginia. I have appeared in the federal courts of Ohio, Maryland, District of Columbia, Virginia, North and South Carolina, and I have also appeared in

court martial proceedings in Norfolk and Saigon, Vietnam.

Q. Can you tell us how many times you have been called to testify in court? A. Well over two hundred, I imagine.

Q. And have you testified in obscenity cases prior to this? A. Yes.

* * * * *

[114] MR. DIETZ:

Q. Doctor, have you had opportunity to examine the exhibits which are contained in the cardboard cartons on the table in this court? A. Yes.

Q. Doctor, based upon your professional experience, can you give us an opinion whether or not the magazines contained in those boxes would appeal to the so-called prurient interest in sex?

* * * * *

MR. DIETZ:

Q. Doctor, would you define prurient interest in sex for the Court, please. A. Prurient interest, as I understand it, implies a more than just a normal sexual arousal in the on-looker.

[115] It also implies a certain degree of unwholesomeness, shamefulness.

MR. PIERSALL: Unwholesome or wholesome? A. Unwholesome, a certain morbidness; a type of arousal in the so-called reasonably normal human being.

MR. DIETZ:

Q. Doctor, to prepare yourself for the many times you have testified in these obscenity cases, have you read and studied the definition propounded by the Supreme Court of the United States in the case of Roth versus United States? A. Yes, I have.

Q. And have you, this morning, reviewed that definition again by re-reading the definition in the case of Roth versus the United States? A. Yes, I have.

Q. And you feel that you have a full understanding of the meaning of the term "appeal to prurient interests"? A. Yes, sir.

MR. DIETZ: Your Honor, I submit that the doctor is qualified to answer these questions.

THE COURT: Doctor, do you agree with [116] this definition of prurient interests? "Given to or springing from lascivious thoughts."

A. That is such a circular definition. I agree with it but I think it is kind of a meaningless definition. It is circular.

I can never go back—I can't pronounce that word—and define lascivious thoughts from prurient interest thoughts.

THE COURT: That is from my Oxford Dictionary.

A. They are very circular. They define one in terms of the other and the other in terms of the first one. I think in general what I said is consistent with that definition; yes, sir.

THE COURT: All right. I think you laid the proper groundwork for the doctor to testify.

MR. DIETZ:

Q. Now, Doctor, can you give us an opinion whether or not the items contained in these cardboard cartons, the magazines contained in those cardboard cartons, would appeal to the prurient interest in sex? A. It would not, in my opinion.

[117] Q. Upon what do you base that opinion, Doctor? A. My own reaction to it since I see myself as a reasonably well-put together person. Also, the reaction of patients of mine to whom I have shown this stuff to find out what their reaction to it was and also to friends of

mine, to staff members at St. Elizabeth's Hospital when we have looked over these books prior to some other types of hearings and also in relation to my basic knowledge and understanding of human behavior as a psychiatrist.

* * * * *

[118] Q. Doctor, would these magazines in the four cardboard cartons go beyond the contemporary community standard portrayal of sex? A. May I qualify that answer?

* * * * *

MR. DIETZ:

Q. Doctor, what, if any, qualifications would you have to voice an opinion regarding community standards in sex? Do you go to any movies? Do you have an opportunity to view magazines and other literature? Do you read books? Would you explain to the Court your background, sir. [119] A. Well, I think I have seen a few movies recently—well, I don't like the movies that are being made. I think the acting is poor, et cetera. I don't read that sort of thing.

However, I do read science fiction, and I was looking for a certain issue of "Fantasy" and "Science Fiction," which I finally had to write to New York for recently, and I spent one morning looking for this issue and went into about fifteen book stores in downtown Washington.

I would say ten of the fifteen stores had books much like that on the street, in front of the store, and in the store.

Q. Doctor, would this material then go beyond what materials you saw in book stores in the District of Columbia area? A. No. It was the same.

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A. I have looked at enough of these books and [120] looked at enough of the type in the book stores for Mr. Dietz in the past so when I see the cover, I know what the contents are.

The content is boringly the same.

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MR. DIETZ:

Q. And your answer, sir, to the question of whether or not these magazines would exceed the contemporary community standard is what, sir? A. Based on my inadvertent search of downtown Washington, it does not go beyond the community standard.

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[122] MR. DIETZ:

Q. In your perusal of these magazines, can you voice an opinion as to whether or not they have any redeeming social value?

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[123] THE COURT: May I ask you to have him define redeeming social values?

MR. DIETZ: Yes, sir.

A. That is has some use; that it has a positive use, shall we say? In fact, I think all of life could be looked at whether it is useful or not.

Some things are negatively useful. In other words, they are the opposite. Some things are positively useful to a greater or lesser extent.

MR. DIETZ:

Q. And in your opinion, sir, would these [124] magazines that are contained in the four cardboard cartons of exhibits have any socially redeeming values? A. They do have a limited usefulness, and I can give specifics.

Q. Would you, sir? A. Yes. It is not common, but uncommon, that a couple where there is a bit of a problem with impotency or frigidity and a little bit of embarrassment maybe between the married man and woman may, if they will look at some of these books there, arouse them or get them in a frame of mind where they can go on to a satisfactory sexual experience with full satisfaction to both the man and wife.

I will say I know a number of cases where that has been used in this manner. There are situations at stag shows where there is a certain positive camaraderie between the men there, and they have some laughs, because I think that is about all it is good for, from the standpoint of the stag shows, the laughs out of it; a certain togetherness is brought out about these, a feeling of unity.

These are two examples that I would give. [125] The first example that I gave, it is a useful thing for a certain minority of people.

Q. All right.

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CROSS EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. Taking them in reverse order, Dr. Hamman, you say they have some redeeming social value, these books. Have you looked at these books, by the way? A. Yes.

Q. Every one of them? A. No, of course not.

Q. You say, "Of course not." You were testifying about each and every one of these books, and you haven't looked at every one of them? How many have you looked at? A. Maybe fifteen or twenty.

Q. Fifteen or twenty out of some three hundred. Which box did you look into, sir? A. I don't even remember. They were on top of the box.

Q. You looked at them here today? [126] A. Yes.

Q. Not before today? A. As I say, all of these books are pretty much alike.

Q. Just answer my question. A. I am.

Q. And I am asking if you looked at these before today? A. Those very books–

MR. PIERSALL: Please instruct the witness to answer the question.

THE COURT: Answer the question. It is perfectly clear.

MR. PIERSALL:

Q. Have you looked at these books today? A. I am not sure you mean those books with that piece of paper and–

Q. I asked you if you looked at the books. You said fifteen or twenty. Have you looked at them before today? A. No.

Q. What time did you arrive in Portsmouth? A. 10:30.

Q. And how long did you spend looking at these books? [127] A. Ten minutes.

Q. Ten minutes? I see. All right. As I understand it, you say these books have redeeming social value; that they would cause sexual stimulation or arousing in those few people who may have problems in that regard, is that right? A. This can be a result, yes.

Q. In other words, you say then, well, would you then, as a psychiatrist, advise some of your patients to go out and purchase these books if they come to you with that type of problem? A. No.

Q. You would not? A. No.

Q. You wouldn't say that these are books of any medical value, that kind of thing, is that right? A. I wouldn't prescribe it, but I wouldn't try and discourage anyone from looking at them, either.

Q. Do you know what hard core pornography is? A. I have a general idea.

Q. Would you say these are hard core pornography? [128] A. No.

Q. Would you say these same individuals who have difficulty in becoming sexually aroused might get the same result from viewing hard core pornography? A. I guess it is possible.

Q. So then hard core pornography has redeeming social value, right? A. You said something I didn't necessarily say. I suspect you can find redeeming social value in just about everything.

Q. No. I said you can find redeeming social value in just about everything; not me. A. You have a lot to learn.

Q. I hope I don't learn it. A. I suspect in just about in many forms of activity in some way, in some area, something about it, some redeeming feature can be found, yes, sir. Whether this be a redeeming feature enough to allow it to exist is something else.

Q. The Supreme Court has said an item must be utterly without redeeming social value. In your definition nothing would be utterly without redeeming social value, is that right? A. I wouldn't say nothing. Only a fool [129] would say that.

Q. I thought you said that. A. I said very few things would have utterly no redeeming value.

Q. But you said hard core pornography would have some redeeming social value? A. I suspect it would be, yes.

Q. So you would allow hard core pornography, is that right? A. No, it is not right. I didn't say yes or no whether I would allow it.

* * * * *

MR. PIERSALL:

Q. Insofar as contemporary community standards and insofar as representation of sexual matters is concerned,

are you saying that these books do not go beyond the customary limits of candor in the representation of sex? A. You mean by that what I think should be the customary candor or you mean what can be purchased in any big city?

Q. You are the witness and you are testifying [130] as to community standards. I ask you whether these books go beyond the customary limits. A. What can be bought in most books stores of this community, no, they don't.

Q. In what part of the country have you perused these books? A. I have not perused but have only seen the covers of books in New York and in Baltimore but I have talked with people who have.

Q. Are they here today? A. No, they are not.

Q. Then you can't testify to that. You say these books can be useful for married couples. Would you suggest that they might also be used for unmarried couples? Do you think that that would be beneficial to society? A. If they are having a reasonably healthy sexual relationship, why not?

Q. This book is called "Sumpin Different"; no volume number that I can see, but it is put out by Tudor House.

There are three pictures on a two-page opening here where it shows, apparently it looks like four people in various poses, standing all around each other. Would you suggest that that is [131] the normal activity that a person should conduct themselves and become involved in? Is that healthy? A. For this type of activity? It certainly is not healthy. It is rather pathological.

Q. Thank you very much. You say all these books are pretty much alike, is that right? A. No. Some of them have two men and some have two women. Some have a man and woman and some have groups.

Q. This particular book in the same box is called "Throttle." I don't see a volume number on this, either.

This is printed by, well, it has NTC down at the bottom. I don't know the printer. What type of book would that be, or rather, what type of person would that be directed to in our society? A. This is a picture of men with their genitals exposed. This is directed towards homosexuals whom I do not consider normal humans; therefore, the law of obscenity does not apply to them.

Q. Does not apply to them? A. Not directly to them, no.

Q. Then an adult book store, where everybody can come in, not just homosexuals, is all right? In [132] other words, these books are not just restricted to just homosexuals; anybody can buy them? A. Certainly. I assume this is the case that anyone can buy it, but my point is that by and large it would be the homosexual who would probably buy that and who might get some arousal.

Most homosexuals wouldn't be aroused by that, either, when you get right down to it; but I was simply pointing out that, as I understand the obscenity rule, that it has to arouse a prurient interest within a reasonably normal individual.

The fact that it might arouse a prurient interest in a homosexual, a psychopath, does not make it obscene.

As a matter of fact, if that were the case, you would have to outlaw darned near everything because a sexual psychopath could be sexually aroused from seeing children's underwear in a catalog, and he would cut out pictures of children in underwear and collect them and put them around his room and masturbate while looking at the pictures.

This is a sick person, so I don't think we can judge community standards or what is good or bad for other people by what a psychopath thinks [133] of it.

Q. I don't think so, either. You said these things would appeal to the prurient interest of one but not another? A. Prurient interest is the definition of a particular type of interest. Now, one person might become quite excited by something which appeals to the prurient interest and another may not.

Q. I am not talking about degrees in pleasure that different people get from this kind of book. I don't think that is the issue. I am talking now at this point about the prurient interest and I believe you testified that these books do not appeal to the prurient interest, is that right? A. In my opinion, they do not.

Q. What interest do they appeal to? A. Curiosity, maybe a mild sexual interest.

Q. All right; the mild sexual interest. Would I be wrong in saying that is a prurient interest? A. I believe you would, yes.

Q. A prurient interest would be an interest which is an unwholesome interest in sex or, as you define it, is that right, or a lascivious interest? A. Yes, sir; unwholesome, lascivious, shameful [134] than just an arousal.

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MR. PIERSALL:

Q. When you say prurient interest, are you talking about from the standpoint of the person who reads it or the standpoint of the magazine, what it is directed to appeal to? A. I have been talking about it from the standpoint of the person who reads it, yes.

Q. Don't you think we should, well, from the standpoint of the magazines or the books themselves, are they not directed to appeal to a certain type of interest? A. Of course they are directed to appeal to [135] a certain type of interest. They would have to be.

Q. And they are directed to appeal to an interest in sex, obviously? A. Probably to some extent. You see, now I would have to have interviewed the people who published the magazines because you are talking about their intent or motive, and in one case I have–

Q. Let me ask you this. I will show you the same book, "Sumpin Different." Will you tell me what other interest that could appeal to?

This could be the same page, but this shows four people on a bed. I really can't tell whether they are men or women except in certain cases, but in those cases where the genitals are exposed, it appears to be a couple of men, maybe a woman, but what do they appear to be doing there? They are all naked on a bed with the hands and faces in various places.

Do you think that appeals to the sexual interest or not? A. Are we talking about the looker or–

Q. I am talking about the sales themselves. What are they directed to? [136] A. I guess to the sexual interest. In my looking at it, and to most people I have talked to, looking at it, it doesn't arouse sex at all but I think it is rather disgusting.

Q. You would say the same thing about hard core pornography? A. Yes.

Q. You would say hard core pornography doesn't appeal to prurient interest? A. I don't think hardly anything that is written applies to the prurient interest, well, if we consider prurient in terms of shameful, unwholesome, and is much stronger than the average sexual appeal.

Q. Nothing that is written would appeal to the prurient interest? A. Little is. Writing does not have that much influence.

Q. I am talking about pictures. A. Well, anything that is published.

Q. That's all.

REDIRECT EXAMINATION

BY MR. DIETZ:

Q. Doctor, in the magazines before the Court, have you had an opportunity to view similar [137] editions in Washington, D.C.

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[138] A. Well, there are several standpoints. One, all this stuff is pretty much alike. It is just different poses, different people doing the same type of poses.

It is terribly repetitious. Two, Mr. Dietz told me, and I consider him an honest man, that I have looked in the past at a different copy of those same books, magazines, that are in those boxes, in his office.

* * * * *

A. Precisely; the same book in his office, a different copy of that same book is what I am trying to say.

* * * * *

MR. DIETZ:

Q. Doctor, in these magazines that we have at issue here today, particularly the book that you [139] were shown, "Throttle," which was supposed to be directed towards homosexuals, did you see any picture of the male penis in erection? A. No, I didn't.

Q. Did you see anything that would indicate arousal, any male penis at aroused rigidity? A. I commented on that. No, I didn't, and I commented on that to you as we were looking through them that obviously the people making the pictures were not sexually aroused or the men would have had erections.

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[141] MR. DIETZ:

Q. Doctor, would these lead to any anti-social activity, and what do you mean by anti-social activity?

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A. I assume by that that you mean sexual activity that is against the law or against the mores of society such as rape, arson, connected [142] with sexual arousal, exposure, voyeurism, that sort of thing.

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A. Reading this type of literature, looking at it, does not cause a person to go out and commit acts that he otherwise would not go out and commit.

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[145] MR. DIETZ:

Q. Doctor, are there any pictures of fallatio, cunnilingus or coitus in these magazines? A. No. May I enlarge upon my answer a little bit to Your Honor?

THE COURT: Yes, sir.

[146] A. I believe when you start, and I don't mean pictures of people with a whip. I think you have to depict it more gracefully through the written word.

When you start to combine or treat the sexuality with rather sick, sadistic stuff like the Mickey Spillane example I gave, then I think you are bordering on something that might arouse something unwholesome in the otherwise normal guy.

I think the unwholesome combination of violence and sex probably comes close to being objectionable under those obscenity standards as anything else.

I don't have other examples in mind except the one I gave.

THE COURT: But, in your judgment, the answer to the question I propounded before and we got off on the

prurient interest part of it, it is my understanding that your testimony is that the magazines in question are not obscene?

A. In my opinion, they are not.

MR. PIERSALL: I have a question.

RECROSS EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. You said there were no pictures of coitus or cunnilingus or anything like that? A. None that I saw.

Q. What are they doing right here? I am showing you an issue of "Swap," Volume 4, No. 1, put out by Pendulum Press.

Can you say that they are not involved in an act of coitus or sexual intercourse? A. The only place where they could be involved in an act of coitus–

Q. You have to get a magnifying glass, don't you? A. You really would.

Q. Isn't that a picture of a man naked laying between the legs of a woman, also naked? A. Yes.

Q. Can you say they are not involved in an act of coitus? A. They could be and they could not be. It really doesn't–

Q. Why would they be in a situation like that? A. Who knows? It doesn't mean they are having [148] coitus. There are magazines showing coitus, no doubt about it, but that picture wouldn't stand up in a court of law.

Q. Isn't that the general position that would lead you to believe that is what they were doing? A. Yes.

Q. Would you believe they were doing something else in that position? They wouldn't be reading a book, would they? A. Well, maybe some people have odd reading habits.

Q. What would you say was going on in this picture? Let me describe it for the record. The man has his back

to the wall and a woman is facing him with her head in the area of his privates and you cannot see his privates. What would you say they were doing? A. This is suggestive certainly of an oral—well, it doesn't show it happening.

Q. What does it show happening? You are saying unless you see a close-up picture of an actual insertion or penetration then you can't say it is happening, right? A. It seems to me, as a lawyer, that should [149] be very evident to you.

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REDIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. In this magazine "Swap," Volume 4, No. 1, which was shown to you by Mr. Piersall, in any photograph do you see a man's penis in the state of erection? A. No.

Q. What is the condition of the male penis in those photographs? Would you describe it as flacid?

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[150] MR. DIETZ: Your Honor, Mr. Piersall has attempted to show that the photographs depict coitus and I don't know, well, let's say I don't know how a man, from my own experience, can commit coitus with a flacid penis, and I believe it is only fair on redirect examination that I bring this back out and have it in the record but if Your Honor has, by your viewing of these books, if Your Honor has already determined the issues to be decided—

[151] THE COURT: I don't want to hear any testimony from the doctor on that question.

I can't see where he would have one thing to offer the Court.

MR. DIETZ: I think the thing for me to do, the proper thing then, is to make my exception to Your Honor's ruling and then sit down and the doctor do the same.

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DR. DONALD WILLIAM NACHAND, a witness called in behalf of the Respondent, having been first duly sowrn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. Doctor, state your name and address, please. A. Donald William Nachand, Cambridge, Maryland.

Q. You are a doctor of what? A. Doctor of Philosophy and Psychology.

Q. Doctor, where are you employed? A. Eastern Shore State Hospital.

Q. What do you do at Eastern Shore State Hospital? A. I am Chief of the Department of Psychology.

Q. Doctor, what institutions of higher learning did you attend to obtain your degree in psychology? A. Bachelor degree in psychology, University of Louisville, Master's degree, University of Chicago; philosophy, University of Chicago.

Q. How many years have you been engaged as a Doctor of Psychology? A. I practiced for twelve years.

Q. In what state? A. After my doctorate, in Illinois and Indiana and in Maryland.

Q. Doctor, have you done any work involving [153] pornography? A. Yes, because of the human sexuality being rather the central interest and especially in my specialty, clinical psychology, I followed it to some degree all along in the past couple of years and I have devoted a substantial portion of time particularly to following the recent and older research findings and scholarly papers in the field.

Q. Have you been on any commissions or rendered any reports, any papers? A. No.

Q. Doctor, have you had occasion to testify in any courts, either state or federal courts, on this subject? A. Yes, I have.

Q. And how many courts and what states? A. United States District Court of Maryland, the state courts in California, state courts in Indiana, state courts in Kentucky. That's all.

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[154] MR. DIETZ:

Q. Doctor, have you had occasion to peruse the magazines that we have at issue in this case? A. Yes.

Q. And based upon your experience as a psychologist, can you voice an opinion as to whether or not these magazines would appeal to the prurient interests of the average individual? A. Yes, I have an opinion.

Q. What is that opinion?

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A. My opinion is that they do not.

MR. DIETZ:

Q. All right. Doctor, in your review of these magazines, have you seen any magazine that depicts fallatio or cunnilingus or coitus? A. No, I didn't see any.

Q. Doctor, in your opinion, would these magazines exceed the limits of the contemporary [155] community standards of materials depicting sex? A. No, I don't believe that they do.

* * * * *

MR. DIETZ:

Q. Doctor, in your opinion, do these magazines have any socially redeeming value, and if so, what value and what do you base your opinion on? A. I believe they probably do have some socially redeeming value.

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A. O.K. I don't grasp the difference, but we will say redeeming social value then. I base my opinion on several

sources. In clinical [156] experience, I have had the same experience previously alluded to with the usefulness of these magazines in assisting couples who have some problem with their sexual relationship.

Also, from the scholarly point of view, one of the studies commissioned, paid for by the Presidential Commission, asked people what their approach–

MR. PIERSALL: Are you testifying from your own experience? A. I am testifying as a scholar based on professional research.

Q. Your research? A. No.

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[157] Q. You may answer. A. One of the researchers reported in the President's Commission Report, I asked individuals sampled across the country what their personal experiences had been with a wide variety of sexually erotically related materials, and I think, if I recall correctly, that the two most commonly given answers were entertainment, well, three, I suppose, the satisfaction of curiosity and information, perhaps; curiosity and information are rather the same thing.

That, I think, is a matter of socially redeeming value.

[158] Also, in my experience, sexually explicit materials are a very traditional, have been a very traditional part of the masculine culture in the United States and are a source of the shared humor and shared bon ami among men. I think that is probably a socially redeeming value.

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[159] Q. The magazines contained in the cardboard cartons on the table and on the floor, do they constitute hard core pornography, Doctor? A. Not in my understanding of that term.

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[160] EXAMINED BY MR. PIERSALL:

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[161] Q. Have you looked at copies of these books? A. I have looked at a large number of them. Let me explain in three ways. When I was down here when this trial date was set some two months ago, whatever it was, and at that time Mr. Dietz provided me with a sampling of, I think, some fifteen to twenty.

Then today, as I looked through there, of course, I passed over all those that I had seen in the sample. I looked at about another thirty [162] and also passed over a very substantial number that I had reviewed for other cases, in other locations, that is identifying them simply by the cover and title, assuming that the contents were the same, so altogether, I am reasonably familiar with them.

Q. With the substance of the books? A. Yes; a very large number of them.

Q. But you have not looked at each and every book? A. Correct.

Q. Would you say you have either directly or indirectly looked at half of them? A. What is the total number?

Q. About three hundred or two-hunred and fifty. A. Perhaps I have.

Q. Perhaps you have? A. Yes.

Q. How many adult book stores have you actually been into? A. Some twenty-five to thirty, I suppose.

Q. Where? A. In Virginia, and–

Q. Were they all around? [163] A. Pretty much all around. It included the East Coast, West Coast, Midwest. I can give you the states if you want them.

Q. I just wanted to know if it were more than the Washington area. A. Oh, yes.

Q. And you have visited these stores for the purpose of purchasing things? A. No, sir; for preparation.

Q. For not only this case, but for other cases? A. That's right.

Q. You testified earlier that you had testified in various courts. Those courts, I don't know if I wrote them all down, but the courts that you testified in in other states, Kentucky, Maryland, Virginia, Indiana, California. Were they all relevant to this type of case? A. Yes.

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[164] Q. How many books other than the ones in this case have you actually looked at and perused? A. Of this type?

Q. Yes. A. Several hundred.

Q. Several hundred? A. Yes.

Q. And have you attended many X rated movies? A. I have attended, I see it as a duty to do so, so I try to attend four or five, well, that is a strange way of putting it, but four or five every season, but they don't come in season; perhaps a dozen or so a year.

Q. Do you do that purposely to prepare [165] yourself? A. Yes.

Q. In other words, you are constantly testifying in this kind of case, right? A. Hardly constantly. I think this is the fourth or fifth appearance.

Q. What were you preparing for? A. Preparing in anticipation.

Q. For this kind of case; this kind of testimony? A. Not simply preparation for legal testimony but theses in the field. I am hoping to write papers and so on.

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[173] MR. PIERSALL:

Q. Look at "Blazing Films," Voluem 4, Number 1. I don't know what page. They don't bother to put page numbers, but there seems to be a picture here, two pictures on the two pages spread apart that, well, you can look at them.

There are the pictures of what appears to be a female genital and in very close proximity to that a male genital. A. Six or eight inches distance, I would say.

Q. Here is a female laying on her back on top of a male with the male and female's genitals exposed and the head of a third person and a tongue sticking out in close proximity to that area of the genitals of the female. A. Right.

Q. You don't think any of that appeals to the prurient interest in sex? A. No, I don't.

Q. What do you think it appeals to? [174] A. It appeals appparently to the normal interest in sex, normal interest and curiosity in sex.

Q. You say three people involved in whatever they are involved in there, without going through the description of it again, is a normal sex activity? A. I don't think whether it is a normal sex activity is a proper question. I said it appealed to the interest and curiosity; normal interest and curiosity.

Q. All right. That appeals to the normal interest in sex, you say.

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[175] MR. PIERSALL:

Q. Doctor, this book is "In Private," Volume 1, Number 1. I will just turn to the middle of the book and there is a picture of what looks to be three females stacked one on top of another with their posteriors exposed very plainly there. A. I believe that is what it is.

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Q. Would that appeal to the prurient interest in sex? [176] A. No.

Q. What does appeal to the prurient interest in sex? A. Let me explain, and this question comes up frequently. Of course, the terminology is not that of my science, prurient interest in sex. All I can do as a psychologist is to try to bring from my science to the law what might be informative or relative to the law.

The prurient interest is a term coined by the law. It belongs to the profession of the law and I do the best I can to accord with that.

Q. Let me interrupt you. You have testified here as to what the prurient interest is, as to the fact these books don't appeal to the prurient interest so you have made an effort, whether it be as a layman's effort within the law or psychologist's effort, so you have made an effort. I am just asking you if you can, in that same vein, tell me what the prurient interest is if this is not. A. Yes. In order for something to appeal to the prurient interest, as I understand the definition, one would have to contrive something that would appeal to a shameful or morbid interest [177] in either sex, nudity, or erection, to the average adult.

Q. Let me go through that. One would have to contrive something which appeals to the what, now? A. To a morbid or shameful interest in sex, nudity, or erection.

Q. Morbid or shameful. Would you say lascivious? A. I have a lot more difficulty understanding that.

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[180] THE COURT: As an expert, and I am recognizing him as an expert, I want his opinion. I don't care what Joe Blow said. I want to get his opinion and then if he would like to tell me about the Commission, I will be glad to hear it.

MR. DIETZ: May the record show I except to Your Honor's ruling?

THE COURT: Yes, sir.

A. If I remember the question, you asked me to give you an example of something that would appeal to prurient interest. I don't know how to do that. You said to give you a photograph or something.

Q. No. Let me put it this way. I have shown you a picture of, I think, some men and women all wrapped up together. I don't know if I showed you that or not, but I showed you a picture of some women all wrapped up together with their genitals exposed, and if I wanted, I am sure I could come over here and show you something else.

If that does not appeal to the prurient interest in sex, what would? I can't contrive anything, myself, to be frank with you.

Are you saying that nothing would be [181] obscene? A. I am saying that what is obscene has to meet the test.

THE COURT: I think what Mr. Piersall is trying to ask you is if you don't think these magazines are obscene, what do you think is obscene?

A. What I have tried to explain is that I feel obliged, and that is the way I have proffered it here. obliged simply to respond to a definition from a sister profession; to bring scientific data from psychology, which may be of some assistance to law.

THE COURT: What are you talking about? What word are you speaking about?

A. Obscene.

THE COURT: "Obscene" is a good, plain, English word, and you don't have to be a lawyer or doctor or psychologist or an architect to know what it means. The average person with any degree of intelligence

understands the word. Now, you have got tests on this type of case, that's true.

A. Yes, sir. If we are not talking about the [182] test–

THE COURT: You are talking as though you don't know what the word "obscene" means. You say it is a legal word and you speak of your assistance and being a psychologist.

A. I understand the common usage of the word "obscene."

THE COURT: All right. Then give us an answer.

A. The most common usage is related to religious tenents. Certain words and phrases were probably the origin of the word "obscene," so in that case, so that any word violating traditional religious tenents is obscene, if we take the general meaning.

MR. PIERSALL: Q. I will show "Twitch" to you. I showed "Throttle" to someone a while ago. This ones series of pictures shows, it looks like two women and one man in various positions. A. That's right.

Q. For instance, here is one which would very definitely indicate someone is about to, if they hadn't already, committed sodomy; is that not [183] true? A. Would suggest it?

Q. Wouldn't you say that suggests it? A. No. To me the suggestion is a posed photograph.

Q. The man has his tongue sticking out there about two inches from the female vagina, isn't that true; maybe three inches? A. Not from the vagina but from the woman's femur.

Q. What does it suggest to you? Of course, the pictures are still pictures. A. Yes. All of these suggest to me–you mean what message do they communicate to me as an individual?

Q. Yes. A. They communicate to me that sex may be used for play.

Q. Any hard core pornography would do for that, would't it?

* * * * *

[184] MR. PIERSALL:

Q. You said these suggesting sex could be used for play? [185] A. Any hard core pornography could be used, but the facial, a more involved neurotic attitude.

Q. So you could justify hard core pornography by your reasons? You could say it is not obscene?

* * * * *

A. I would say some might be; some might, some might not.

MR. PIERSALL:

Q. You have given an explanation for this which I assume you are going to say, therefore, makes it not appeal to the prurient interest because you said it suggests sex can be play, and, therefore, doesn't appeal to the prurient interest? A. That would be one reason. There are other reasons for knowing it doesn't appeal to prurient interests. For instance, we know ordinary, normal people are sometimes exposed to neurotic material on a wide range, from this up to hard core; what it apparently does is simply increase slightly the likelihood that they will [186] engage in their traditional sexual behavior.

* * * * *

Q. The point is, Doctor, whether or not any particular individual would be aroused by this literature is not the point, I don't think. The point is does it appeal to that interest? Would it tend to appeal to prurient interests; You say [187] none of it would tend to appeal to prurient interest other than a sick person? A. It would not tend to appeal to the prurient interest of the average adult.

Q. But it would tend to appeal to somebody other than an average adult? A. Possibly.

Q. You know what the average adult is? A. Yes.

Q. All right. Now, you say that these things have some redeeming social value? A. Yes, sir.

Q. What redeeming social value would that last book I showed you have, the one that had the men and women all wrapped up together, with a tongue sticking out? A. About the same I mentioned when I answered that question.

Q. I don't remember. Will you repeat it? A. I will try. That they satisfy to some degree a normal interest and curiosity about sexual matters; that they may be of some aid in marriage for couples who have some difficulties with their sexual relationship, and they represent a traditional bond among males, at least in [188] our society, of sexual humor.

They are very frequently used in a social setting shown around among a group of men who share vigorous, humorous remarks with one another.

Q. With that in mind, do you recognize that there might be some printed items which might be obscene? A. Any one that satisfies the test would be obscene.

Q. Would you know of anything that would satisfy the test you just gave? Is there anything printed that would not tend to, which could not pass your test and still be obscene?

You are saying that these tend to cause people to be aroused, some people. You said some people. You didn't say the average person but some people, wouldn't tend to be aroused by that. Would that not be true of hard core pornography? A. I don't think I made the answer you characterized.

Q. Would you say it might cause certain people to be aroused? A. I don't remember saying anything like that.

* * * * *

[189] Q. Maybe I didn't state it, but didn't you say it was used by certain married couples? A. Yes, sir; for certain purposes for presexual responses activity.

Q. To be aroused? A. Yes.

Q. Wouldn't that be true of anything, even hard core pornography? A. No, I think some things are not suitable for that purpose.

Q. How about hard core pornography? A. That is what I mean. Some types are not suitable. Some types are.

Q. Some types of hard core pornography, in your definition, would not be obscene? A. Yes, that is right.

* * * * *

[190] DR. HERMAN RICHARD KASTNER, a witness called in behalf of the Respondent, having been first duly sworn, was called to the witness stand, and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. Please state your full name and address. A. Richard Herman Kastner; business office, 7518 Riverdale Road, New Carrolton, Maryland.

Q. You are a Doctor of Medicine, specializing in psychiatry? A. I am a Doctor of Medicine and Psychiatry and also a Doctor of Philosophy and Psychology.

Q. Will you please state your credentials, how you obtained your degree; what universities, institutes of higher learning you attended, and [191] what papers you have written and what experiences you have had in the practice of psychiatry. A. I took my original Master's degree at New York University in psychology and English; Master's degree in psychology, City College, and Doctor of Philosophy and Psychology, New York Univer-

sity; between the year 1952 and 1956, I attended medical school in Philadelphia and received my Doctor of Medicine degree in 1956; the internship from 1956 to 1957 at St. Luke's Hospital, Bethlehem, Pennsylvania.

From there I left for the University of Minnesota then to Mayo Complex, Rochester, and served two years residency in psychiatry and was activated as military psychiatrist. I served with the Air Force for two years on active duty as a military psychiatrist and two years as a consultant to the Armed Forces Institute of Pathology.

After that I joined an institution called The Protection Institution which is a special protection for recidivist patients, criminals, and spent two years on the active staff as Director of Research.

I was consultant for the National Institute of Mental Health and Psychiatrists. I am [192] in private practice, as a "shrink," so to speak.

Q. How many years have you been in private practice? A. Eight, nine, ten years.

Q. Doctor, have you even been qualified as an expert to testify in any court in any states or in any federal courts? A. Yes. I testified, of course, for the State of Maryland on a number of occasions to commit a patient to the Patuxent Institution, and also I testified in the District of Columbia in the federal courts.

Also, I was at St. Elizabeth's Hospital for one year.

Q. Dr. Kastner, have you had the opportunity prior to today to review the magazines, the same as are contained in the Court's cardboard cartons on the table and on the floor here today? A. You delivered a series of cartons of material which were put in my office. I then reviewed this for some five and a half hours.

Also, reviewing some of it currently, the current literature and some of the opinions and ideas, and in

addition to this, I took the liberty of speaking to two or three private [193] psychiatrists, informal discussions, asking their general opinions in the matter.

Q. Doctor, upon your review of the magazines which we have here in court today, can you give us an opinion as to whether or not these magazines or the contents thereof would appeal to the prurient interests of the so-called average person? A. I would like to, with Your Honor's permission, clarify one thing in this matter, the term "prurient" is a social definition, a social term and what constitutes prurience has to be, in a manner of speaking, statistically defined; one particular culture, one particular time it may be considered prurient and another culture, another time, it may not.

A typical example would be the Bikini bathing suit, which, in 1920, would have been considered quite prurient.

The question of whether this material is prurient really should be derived at as a matter of statistical analysis of what is going on.

You have no way of really understanding this. The material constituted various forms of intended or actual portrayal of and I think this is unimportant at the moment whether they were or [194] were not, these sexual activities, and these include cunnilingus and fallatio plus, perhaps, some idea of intercourse to a psychiatrist and practicing physician, both as a general practitioner and as a specialist, these particular forms of sexual activity are not necessarily but may be aberrant, that is abnormal.

The term "prurient," if I am using it correctly, would be restricted to a very small population. Therefore, I would say to most people it would not necessarily appear to be prurient.

Q. Doctor, in your use of the word "prurient," have you had the opportunity before today and again to review today the definition of "obscenity" as appears in the case of Roth versus the United States 354 U.S. 70? A. I have read it and I must admit that although I read it several times, I have some difficulty as a psychiatrist, understanding the legal terms. I have a general idea.

Q. Now, Doctor, in your review of this material, can you tell the Court it contains anything of medical value or of redeeming social value? A. Well, first of all, one of the things that [195] I had been curious about was whether this material became a significant stimulant, a pathological stimulant to people. The term "pathologic" here means a sick kind of relationship that would produce sick behavior and have it acted out in an inappropriate manner.

When most of the people saw this, and I have given this to perhaps twenty or thirty people for evaluation, most of the people that saw it, it was sort of an enlightening, stimulating situation.

After they had gone through one or two of the literature, maybe three or four, they tended to become rather bored with it and looked rather prosaic.

Secondly, in discussing this matter with other physicians in terms of people who commit sexual acts that are dangerous to society, pedophile, the person who is involved with child molesting or the person who may involve himself in rape, many times these people have no sexual outlet whatsoever.

They have no means of satisfying their sexual impulses and I took the liberty of discussing this with child psychiatrists and one of the psychiatrists felt— MR. PIERSALL: We object to what some [196] other psychiatrist thought.

A. My opinion was consistent with his.

THE COURT: If you give your opinion, it's all right.

* * * * *

A. Think you very much, Your Honor. All that I am saying, in general, is that sometimes the books do have some very significant value. Other than that, when it comes to the naivete of many of the patients who have little sexual experience, there are a variety of appropriate instructional books.

[197] Whether this would be considered appropriate as a matter of artistic endeavor, well–but I will say from a medical point of view, these characteristics, these activities, these behavior patterns, cunnilingus and fallatio are rather usual activities among even normal married people.

These become merely decorative elements or instructive material for people who are not informed about the normal activities and who have, perhaps, some sense of guilt or shame about it.

* * * * *

CROSS EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. As I understand it then, you are saying that these books–let me try to paraphrase what you said. These books do not appeal to the prurient interests because their portrayal of sex– A. That is not what I said, sir. I said they do not appeal in general to the prurient interests although they may appeal to the prurient interests of a limited group of people.

Q. You said the reason for that is because these are all normal sexual activities described? A. I would prefer to use the word "normal" [198] in the sense that they are normally carried out in the privacy of one's own home.

That's fine. I can understand what you are saying. The thing that bothers me here is that you are saying then that these do not appeal to the prurient interests because they only depict actions which are carried out in the privacy of one's home, right? A. No. I think they have to appeal to the prurient interests when it is so surreptitious and so hidden that they have a great deal of mysticism about it.

People, well, for example, I would say let's pick out a gentleman in the audience here and ask him theoretically if he ever involved himself in the particular kind of activity and I would estimate 50% or 60% or 70% had done this.

Therefore, although this may be stimulating, it may be interesting, and it may be sexually stimulating, I don't think necessarily it pertains to the prurient interest.

Q. What else is it? A. There you come into a peculiar situation of what constitutes prurient interest to the individual. To some people it would be prurient. To [199] others it would not.

Q. What you are saying, in fact, is that nothing would be obscene to you, would it? A. Not to me. We have to clarify it.

Q. By your definition? A. I am saying to most people these pictures, this particular material would not be obscene.

Q. Let me interrupt you. By the explanation you have given, I would dare say that explanation would fit anything, any depiction of normal sexual activity? A. A bikini—there is an interesting article in the Washington Post that a bikini might be prurient to the DAR. I am sure it is quite possible.

Q. Why would it be prurient? A. Because to some people, to them, it is offensive. Any kind of social action will also be offensive to a limited group of people.

Q. What you are saying then, in your opinion, the depiction of sex in these books is not offensive to the average person, is that right? A. No. I will say it is not offensive. It may be stimulating, and I have seen the books, and if you want to give me the three stacked ladies, I am well aware of that. I think they are probably [200] stimulating, I think surreptitiously to the males and I think it enhances their image in their fantasy, but not prurient.

Q. Wouldn't hard core pornography do the same thing? A. I took the liberty of listening a few minutes ago, and I am confused about what you call hard core pornography. Some people might call this hard core and some wouldn't.

Q. There is something else that is called hard core pornography? A. I don't know what it would be.

Q. You don't? You can't conceive of anything worse than that? A. I can conceive of something different from this.

Q. You are saying this does not appeal to the prurient interest and you say hard core pornography, you don't know exactly what that is? What would appeal to the prurient interest of the average person? A. I have absolutely no idea what would be prurient interest unless I went out as a scientist and sampled, with appropriate mathematical tools, what constitutes prurient material.

[201] Secondly, I think you have to define this beforehand. There have been no statistical studies as to what constitutes prurient interest. Prurient interest is a moral thing.

Q. It differs from person to person? A. Yes, and I must respect it.

Q. Prurient interest differs from person to person? A. Correct.

Q. You don't deny these books might appeal to the prurient interest? A. I say these books might tend to appeal to prurient interests of some but not to the prurient interest of most people.

Q. Do you know what the standards are of most people? Do you feel yourself qualified to say that? A. I wouldn't be that presumptuous.

Q. You have said it, though, haven't you? A. I will rephrase this. I will say I have come across a good number of professional situations which give me a reasonable indication of what constitutes unusual sexual behavior.

You may say because a psychiatrist is a psychiatrist he has to serve people coming to him, [202] but if you talk about this in a more common and more ordinary way, most of the people engage in the various same activities that are demonstrated in that particular set of literature.

Q. But that doesn't mean the depiction of even the normal act of coitus—without getting into a debate as to whether or not these other things are normal, I think we can all accept that an act of coitus is a normal thing with married people— A. To some it isn't, sir. Many women do engage in sexual contact and they dislike it intensely. I think we ought to clarify this.

Q. Fine. Even the normal act of coitus could appeal to the prurient interest, couldn't it? A. To a group of people who are disturbed.

Q. They have to be sick? A. Yes. I think you have to have, if not a psycho—

Q. What is prurient interest?

MR. DIETZ: He didn't finish the answer.

I would like to hear it.

A. Thank you. What I am trying to really say is that there are people who are sick and see this as a normal act or abnormal act. I think the [203] question comes up as

to what constitutes prurient interest, and prurient interest is merely a social term. I have no knowledge of it as a psychologist. I have no knowledge of it as a physician, and I have no knowledge of it nor do I recognize it as a psychiatrist.

If you would ask me does this material offend people, I would say to you, "Not necessarily."

I think it is startling, demonstrative, stimulating, interesting, but I don't think it is necessarily prurient to most people.

Q. To most people, the people you have discussed it with are other psychiatrists, is that right? A. I have given it to some of the patients to examine, too.

Q. How many patients? A. About twenty all together. I sampled about twenty people.

Q. Of your patients? A. Well, I can't go to someone else's patients.

Q. How many of these cases have you testified in? A. This is the first case I have ever [204] testified in as to this particular situation.

Q. What do you mean by this particular situation? A. For this kind of literature.

Q. Have you ever testified in any other obscenity cases? A. No.

Q. That's all.

THE COURT: Would you agree with this definition of the word prurient? "Given to or springing from lascivious?–

A. Yes, I would but with one comment added to it; the individual lascivious thought. It must reside within the individual.

THE COURT: A lascivious thought would, but a group–

A. It is an individual concept, sir.

THE COURT: Don't you think that with that sort of material, with people that go into these stores and buy that sort of material, don't you think it is because of the lascivious viewpoint of their nature?

A. Can I translate that into medical terms?

THE COURT: Yes.

[205] A. I think they are interested in the hidden and abnormal and unusual and they are interested in a sort of a forbidden taste of the forbidden fruit, but whether this is lascivious, and lascivious implies sexual bestiality, it implies this: not necessarily. Not necessarily.

For example, I will say I recall in the military when we went through the bunks, the men had pin-ups of women there. During World War Two if a girl would be in a bikini, it would be considered lascivious. It would not be considered lascivious now. If you go in swimming now with any more than a bikini, you would be considered over-clothed.

To some people it would be considered lascivious. To most people it is probably a very stimulating situation which he ends up being bored with afterwards.

We saw this in medical school, by the way. In the third year medical school, they brought in drity movies. Everybody would rush to see it, and by the time they brought in the third movie, we would say, "The hell with it" and go back to the laboratory and work.

THE COURT: You referred to the DAR. Were [206] you referring to the Daughters of the American Revolution?

A. Not in a disparaging manner.

THE COURT: Why do you think a young girl in the DAR is different from any other young girl who goes to church?

A. No, sir. I was commenting on something in the newspaper.

THE COURT: Evidently the newspaper felt that way.

A. No. The newspaper was trying to show that certain organizations are more conservative, as it should be, and certain organizations are more liberal, and it depends on left or right where it stands.

To a Democrat, a Republican is a fascist—I am being very candid—and to a Republican, a left-wing Democrat is a Communist. It really depends upon where you stand.

The comment about the DAR was only brought in to bring out a standard to judge that there are different communities, different people and different standards and to some people certain materials would be lascivious or prurient. To other people it would not, and I think this is the real [207] issue, Your Honor.

THE COURT: In your judgment then, Dr. Kastner, it is my understanding from your testimony that you feel that the majority of our citizens, and I am referring to what would normally be considered the average citizen, that these magazines would not be obscene?

A. Not necessarily, sir.

71-1315

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MICHAEL RODAK, JR., CL

COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

HOWARD ALEXANDER,
FRANK COLLIER,
VILLAGE BOOKS, INC.,
MEDIA ARTS, and
GUILD PRESS, LTD.

Petitioners

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above entitled case on January 17, 1972:

OPINIONS BELOW

On May 19, 1970, the Commonwealth Attorney for the City of Portsmouth, Virginia, initiated litigation to bring the

Petitioners before the Court of Hustings for the City of Portsmouth. A Petition, to declare some 300 books and magazines to be obscene and to temporarily restrain their sale, was filed and on June 3, 1970, the Court of Hustings for the City of Portsmouth, Virginia, issued a Rule to Show Cause, returnable June 12, 1970, which hearing was continued until August 19, 1970. The Petitioners filed a Motion to Dismiss the Petition, alleging the Virginia Statute to be unconstitutional, which was denied by the Court of Hustings. Trial was held on November 4 and 5, 1970, resulting in the Court of Hustings for the City of Portsmouth declaring all of the books and magazines involved to be obscene and enjoining their sale on November 20, 1970. The Opinion of the Court of Hustings for the City of Portsmouth is unreported, but appears at Record Page (A 16), and the Rule to Show Cause and the Injunction appear at Record Page (A 18). The Petitioners appealed to the Supreme Court of Virginia which Appellate Court affirmed the action of the Court of Hustings for the City of Portsmouth, in an Opinion dated January 17, 1972, which is reported at 212 Virginia 554, S.E.2d , Record Page, (A 1).

JURISDICTION

The judgment of the Court of Hustings for the City of Portsmouth was entered on November 20, 1970, pursuant to Section 18.1-236.3 of the Annotated Code of Virginia. The Opinion of the Supreme Court of Virginia, affirming the Court of Hustings for the City of Portsmouth, was entered on January 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257, (2,3); §1201(c).

QUESTIONS PRESENTED

I. Is §18.1-236.3, of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging

obscenity rather than a national community standard, and by providing for establishing a fact, through civil proceedings, for use in criminal prosecution, all in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

II. Are the approximately 300 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense, without sale or exhibition to juveniles, obtrusive advertising or pandering?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitutions of the United States of America and the provisions of §18.1-236.3 of the Annotated Code of Virginia, are set forth in the Appendix hereto at Pages 23a and 24a.

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth Attorney for the City of Portsmouth, caused to be issued a Writ of Subpoena Duces Tecum to the Petitioners, Howard Alexander and Frank Collier, both employees of the "Adult" bookstore in the City of Portsmouth, Virginia, operated by the Petitioner, Village Books, Inc. The Subpoena commanded their appearance on May 22, 1970, in the Court of Hustings for the City of Portsmouth, to bring with them copies of approximately 300 books and magazines. Petitioner, Frank Collier, who was served with the Subpoena Duces Tecum, appeared in the Court of Hustings for the City of Portsmouth upon that date with the books and magazines named, which constituted 99% of the literature offered for sale at the Petitioner's "Adult" bookstore in the City of Portsmouth, Virginia. The Commonwealth Attorney took the books and magazines and thereafter, on January 3, 1970, the Court of Hustings for the City of Portsmouth issued a Rule to Show Cause why the books

should not be adjudicated obscene, pursuant to a Petition for an Order temporarily restraining the sale or distribution of all of the named books and magazines. On June 12, 1970, the return day on the Order to Show Cause, the Petitioners appeared through Counsel, to request a Stay of Proceedings upon the ground that an Adversary Hearing had not been affored to the Petitioners upon the issue of obscenity prior to the seizure of the books and magazines. The Court of Hustings for the City of Portsmouth denied the Motion for a Stay, but continued the hearing on the Petition for an Order temporarily restraining the sale or distribution of the questioned books and magazines. The Petitioners filed an Answer to the Petition and a Motion to Dismiss the Petition, which was heard by the Court of Hustings for the City of Portsmouth, on August 19, 1970. Following the denial of the Petitioners' Motion to Dismiss, the case was tried by the Court of Hustings for the City of Portsmouth, without a jury, on November 4 and 5, 1970. At the trial, it was stipulated that the Petitioners' "Adult" bookstore did not sell or distribute any literature to juveniles, (T. 3). The City of Portsmouth introduced as a witness, an insurance salesman, Mr. Robert L. Holly, in an effort to establish the community standards of acceptance of comparable erotic literature. Mr. Holly was permitted by the Court of Hustings to testify as an expert on community standards, (T. 37), and stated his opinion that generally the books and magazines at issue exceeded the community standards of erotic materials, (T. 45-46). Although he is not established as an expert in any other field, Mr. Holly was also permitted to testify, over objection, regarding his opinion of the prurient appeal and social value of the questioned literature, (T. 47). He was of the opinion that some of the books and magazines, without differentiating which books or magazines he was referring to, had redeeming social value, (T. 47). He was of the opinion that none of the books and magazines could be considered "hard core pornography", (T. 53), and he felt that portrayal of sexual organs in photographs exceeded the community standards, (T. 57). The Commonwealth then offered the testimony

of a psychiatrist, Dr. Donald Lee Mingione, who was of the opinion that the books and magazines would appeal to the prurient interest, which he considered to be an appeal to sexual arousement, (T. 63, 71). The Commonwealth then introduced as a witness, Mr. Richard Messenger, the proprietor of a printing establishment, who relied upon bulletins from the National Association of Printers to ascertain what he should be permitted to print (T. 83, 98); Mr. Messenger also was a Captain of the Auxiliary Police Force of the City of Portsmouth, (T. 84). The witness was of the opinion that the questioned literature would appeal to the prurient interest, which he considered mere sexual arousal, (T. 86). He considered only seven (7) of the books, out of approximately 300, to be obscene, (T. 87). And he determined that there was social value for art students in several of the magazines, (T. 89), and that more than one half of the books and magazines involved would not be obscene in his opinion, (T. 90). His determination of the prurient appeal was as to the literary materials appealing to "Young Persons" under nineteen (19) years of age, (T. 95), not adults. The Petitioners, following the denial by the Court of Hustings of their Motion to Strike, (T. 108-110), offered the testimony of Dr. Wilbur Hammon, a U.S. Government psychiatrist, employed at St. Elizabeth's Hospital in Washington, D.C., and engaged in the private practice of medicine, specializing in psychiatry in the State of Virginia, (T. 111). Dr. Hammon was of the opinion that the books involved would not appeal to the prurient interest of the average viewer, (T. 116), although they only had a limited social value, (T. 124), and that the magazines did not constitute hard core pornography, (T. 127). Thereafter, the Petitioners presented the testimony of Dr. Donald W. Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital, in Cambridge, Maryland, (T. 152), who was of the opinion that the literary materials would not appeal to the prurient interest of the average viewer, (T. 154), and that they did not exceed community standards of tolerance in the acceptance of erotic material and that they had redeeming social value, (T. 155-158). Dr.

Nachand agreed with the prior witnesses that the books and magazines could not be considered "hard core pornography", (T. 159). The Court of Hustings would not consider the results of the Presidential Commission Report on Pornography, (T. 180). The Petitioners also offered the testimony of Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, who was of the opinion that the challenged material would not appeal to the prurient interest of the average person in the community, (T. 193-194), and that the literature did contain socially redeeming material, (T. 196-197), and that the magazines containing photographs of simulated sexual activity would not necessarily appeal to the prurient interest of the average person, (T. 207). Following the testimony, the Petitioners, through Counsel, again moved the Court to enter judgment in favor of the Petitioners, which was denied, and the Court entered an Order declaring obscene, and enjoining the sale of all of the approximately 300 questioned books and magazines. Petitioners appealed to the Supreme Court of Virginia, which Court on January 17, 1972, affirmed the action of the Court of Hustings for the City of Portsmouth, Record Page, (A 1).

HOW FEDERAL QUESTIONS ARE PRESENTED

Prior to the trial in the Court of Hustings for the City of Portsmouth, Virginia, Petitioners raised as issues the constitutionality of §18.1-236.3 on the Annotated Code of Virginia, alleging that the Code violated the First and Seventh Amendments to the Constitution of the United States of America, by denying a trial by jury in an obscenity litigation and that the Virginia Code section provided for a prior restraint on literary materials in violation of the First Amendment to the Constitution of the United States of America and the Virginia Code section provided for a local, city-wide, community standard for judging obscenity rather than a statewide or national standard, in violation of the First and Fifth Amendments to the Constitution of the United States of

America, and that the Virginia Code section was vague and indefinite, in providing for proof of a fact for use in subsequent criminal proceedings, (scientor or knowledge of obscenity), by means of a civil proceeding in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America. At the trial in the Court of Hustings for the City of Portsmouth, Petitioners raised the issue that all of the books and magazines were protected by the First Amendment and not obscene and following the issuance of a permanent injunction by the Court of Hustings for the City of Portsmouth, the Petitioners urged reversal in the Supreme Court of Virginia, upon the additional basis that the Virginia Code was vague and indefinite, and the procedures followed were unconstitutional, in that the Court of Hustings for the City of Portsmouth issued a permanent injunction which was not provided for by §18.1-236.3 of the Annotated Code of Virginia. All of the foregoing questions were decided adversely to the Petitioners' position by the Court of Hustings of the City of Portsmouth and the Supreme Court of Virginia.

REASONS FOR GRANTING THE WRIT

I. Petitioners argue that §18.1-236.3 of the Code of Virginia is repugnant to the Constitution of the United States of America.

In the Court of Hustings for the City of Portsmouth, Petitioners demanded a trial by jury, (T. 3, 8/19/70), which was denied by the Court. Subsection 8 of §18.1-236.3 of the Code of Virginia, provides for trial without a jury. This Court in *Roth v. United States*, 354 U.S. 476, determined that a jury trial is constitutionally mandated to determine the issue of obscenity under the First Amendment to the Constitution of the United States of America. This Court did not reach that issue in its determination of the constitutionality of the New York State statute in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, see the dissenting opinion of Mr. Justice Brennan.

The Petitioners also allege that Section 18.1-236.3 of the Code of Virginia is repugnant to the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, *Mapp v. Ohio*, 367 U.S. 643, in that the Virginia Code, § 18.1-236.3, subsections 3 and 4, permit a prior restraint of literary materials by authorizing a temporary restraining order prohibiting the dissemination of alleged obscene materials without providing for an adversary hearing on the issue of obscenity prior to any restraint, *Freedman v. Maryland*, 380 U.S. 51; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Marcus v. Search Warrants*, 367 U.S. 717; *Quantity of Books v. Kansas*, 378 U.S. 205; *Tyrone v. Wilkinson*, 410 F.2d 639.

Subsection 8(b) of Section 18.1-236.3 of the Code of Virginia is repugnant to the First and Fifth Amendments to the Constittution of the United States of America, by establishing an improper local city-wide community area to establish standards of measuring the degree of tolerance of erotic material, rather than considering the state-wide or national contemporary community standards of acceptance of erotic materials. The application of a local area rather than a statewide or national area in considering contemporary community standards of tolerance of erotic literature is unconstitutional. Local guidelines are not appropriate, for if local contemporary community standards for what they might proscribe as obscene, " . . . the constitutional limits of free expression in a nation would vary with state lines." *Pennekamp v. Florida*, 328 U.S. 331 at 335. Under this local area standard a book acceptable in Richmond could be condemned in Norfolk, less than 100 miles removed. It was to avoid that unthinkable result that Mr. Justice Brennan, announcing the judgment of this Court in *Jacobellis v. Ohio*, 378 U.S. 184, said, "The constitutional status of an alleged obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding." *Id.* at Page 195; see also the concurring opinion of Mr. Justice Harlan in *Manual Enterprises v. Day*, 370 U.S. 478 at 488.

Petitioners argue that Section 18.1-236.3 is unconstitutionally vague in violation of the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution of the United States of America in that the Virginia Code provides for a quasi-criminal proceeding for the purpose of civilly establishing a proven fact (knowledge of obscenity or scienter) for use in a criminal prosecution, without affording the defendant-respondent his constitutional right to a trial by jury on all issues of fact in a criminal case. Subsection 13 of Section 18.1-236.3 of the Code of Virginia provides that the proceedings, "shall be intended only to establish scienter in cases where the establishment of said scienter is thought to be usable or desirable by the Petitioner", (The Commonwealth Attorney). At any subsequent criminal trial the introduction of a finding of the Court of Hustings for the City of Portsmouth relating to knowledge of obscenity or scienter, in any criminal case would clearly be unconstitutional and deny the party defendant therein, of his right to confront witnesses and of his right to a jury determination of each and every issue.

Section 18.1-236.3 of the Code of Virginia is unconstitutionally vague in that it provides for a temporary restraining order, but it does not provide for the issuing of a permanent injunction, restraining the sale of alleged obscene literary books and magazines. The Court of Hustings for the City of Portsmouth entered such a permanent injunction order herein, which Petitioners argue was an unconstitutional infringement upon their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. This void in the grant of authority to the Court of Hustings for the City of Portsmouth is apparent when subsection 13 of the Virginia Code is considered in relation to Subsection 11, which refers only to "temporary restraining order", and the Virginia Code is devoid of any other authority to permanently enjoin the dissemination of literary materials. This unconstitutional usurping of authority by the Court of Hustings for the City of Portsmouth, and the denial of the Petitioners' rights pro-

tected by the Constitution of the United States of America, should not be countenanced by this Court.

II. Petitioners argue that all of the approximately 300 books and magazines are protected by the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and that the decision of the Court of Hustings for the City of Portsmouth was contrary to the law and the evidence. All of the witnesses who supplied evidence in the Court of Hustings for the City of Portsmouth agreed that the approximately 300 books and magazines at issue did not constitute "hard core pornography", (T. 53, 89-90, 127, 159, 196-197). Since 1957, when this Court decided *Roth v. U.S.*, 354 U.S. 476, it has been recognized that sex and obscenity are not synonymous and constitutional protection has been afforded all literary materials not utterly without social value, *Memoirs v. Massachusetts*, 383 U.S. 413. In the case of *Redrup v. New York*, 386 U.S. 767, this Court, per curiam, in reaffirming the definition of obscenity in *Roth v. United States*, supra, as amended by this Court's subsequent decisions, considered three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the erotic material; (3) Pandering of the material as described in *Ginzburg v. U.S.*, 383 U.S. 463. In the Court of Hustings for the City of Portsmouth, it was stipulated that the literary materials at issue were not sold or distributed to juveniles, (T. 3). There was no testimony afforded, and there could not have been any testimony, regarding alleged pandering or obtrusive advertising. Petitioners argue that it is irrefutable that the approximately 300 books and magazines involved herein are therefore, within the scope of the protection of the First Amendment to the Constitution of the United States of America. This Court has on numerous occasions re-emphasized this interpretation of the law of obscenity in per curiam decisions granting certiorari and reversing lower Courts citing only *Redrup v. New*

York, supra. Of these recent decisions we should compare *Carlos v. New York,* 396 U.S. 119, reversing 24 N.Y.2d 86, 301 N.Y.S.2d 96, wherein the New York Court of Appeals had held the questioned material to be "hard core pornography. In the Court of Hustings for the City of Portsmouth, all of the testimony, the Commonwealth's evidence and the testimony elicited by the Defense, was that the approximately 300 books and magazines did not constitute hard core pornography, and did not vividly depict scenes of fellatio, cunnilingus or coitus. Some of the books and magazines contained photographs depicting *simulated* erotic activities that suggest, but leave to the imagination, the consummation of the sexual activities. The photographic technique is superior and the books and magazines are protected by the First Amendment to the Constitution of the United States of America. Both the Court of Hustings for the City of Portsmouth and the Supreme Court of Appeals of Virginia, refused to consider this Court's decision in *Bloss v. Dykema,* 398 U.S. 273, reversing 17 Mich. App. 318, 169 N.W.2d 367, by condemning as obscene the magazines "Cover Girl" and "Exciting" which were the subject of the latter decision wherein this Court was again forced to apply the protection of the First Amendment to challenged literary material.

The Supreme Court of Virginia refused to make an independent judgment of obscenity or to consider this Court's action in *Burgin v. South Carolina,* No. 70-122,___U.S.___. ___L.Ed.2d___, reversing the Supreme Court for the State of South Carolina, 178 S.E.2d 325, in which opinion the South Carolina Court described the magazines, "Mirage", "Togetherness", "Fair Lady, No. 1", and "Flesh Fantasy, Vol. II, No. 1", as follows:

> "... We have studied the material to make a de nova determination of obscenity vel non. We find that each of the four magazines is comprised almost totally of photographs which display nude young women in poses that center the attention of the viewer upon the vulva and surrounding area. They obtrusively expose

> the female genitalia in an obvious design to appeal to a prurient interest in sex. They serve no additional purpose except to produce revenue for the sellers. These magazines are a degrading, disgusting exploitation containing no pretense of artistic value. They cannot be permitted in a society which hopes to retain any semblance of constitutional and moral stability. The dissemination of this smut, which is utterly without redeeming social value, cannot be placed beyond the reach of the law. The argument that adults should be free to see and read what they want must be weighed in light of reality. Each time the first amendment is stretched to include license to sell materials of the type involved in this action, a new flood of publications come into being. The benefits to society from freedom of speech and of press can best be protected by curbing license. Applying contemporary community standards, we find beyond a reasonable doubt the dominant theme of the magazines taken as a whole appeals to the prurient interests and are patently offensive and obscene in the constitutional sense. They are utterly without redeeming social value."

This Court had comparable books and magazines for consideration in Case No. 71-443, *Wiener and Dulin v. California*, ___U.S.___, 30 L.Ed.2d 539, in both of those cases, this Court on December 14, 1971, one month and three days prior to the action of the Supreme Court of Virginia, herein, granted certiorari and reversed the judgment of the lower Courts, citing *Redrup v. New York*, supra. Petitioners argue that the First Amendment to the Constitution of the United States of America must be given effect in all fifty of our United States to protect the rights of the Petitioners to sell books and magazines which are not obscene, as well as the rights of the public, in all of our fifty states, to purchase and read literary material which is not obscene as defined by this Court and thereupon, a Writ of Certiorari to the Supreme Court of Virginia should issue and the judgment of the Court below should be reversed.

CONCLUSION

In summary, the approximately 300 books and magazines condemned by the Courts below, do not constitute hard core pornography, although a few depict *simulated* erotic activities without vividly depicting sexual action or congress, and all said books and magazines are protected by the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and therefore, they are entitled to be declared not obscene. In addition thereto, procedurally the flaw in declaring the geographical area for consideration of community standards to be that limited area of the City of Portsmouth, Virginia, should command the issuance of a Writ of Certiorari herein. This Court should also issue a Writ of Certiorari to the Supreme Court of Virginia, to establish the right to a trial by jury in an obscenity litigation, and further, to prohibit a prior restraint on literary material without an adversary hearing as well as to afford the Petitioners the equal protection of the law as established by the prior decisions of this Court.

Therefore, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

STANLEY M. DIETZ
Attorney for Petitioners

APPENDIX

SUPREME COURT OF VIRGINIA
AT RICHMOND

Present: All the Justices.

HOWARD ALEXANDER, et al.,

v.

COMMONWEALTH OF VIRGINIA

PER CURIAM

Record No. 7726

Richmond, Virginia
January 17, 1972

FROM THE COURT OF HUSTINGS
FOR THE CITY OF PORTSMOUTH
R. Winston Bain, Judge

Pursuant to Code §18.1-236.3, the Commonwealth's attorney for the City of Portsmouth petitioned the trial court to adjudge certain magazines to be obscene. On August 3, 1970, a motion to dismiss was filed alleging that the statute is unconstitutional as being repugnant to the First Amendment to the Constitution of the United States. On November 4 and 5, 1970, the case was heard on its merits, and on December 5, 1970, the court entered an order adjudging the magazines obscene and restraining the sale or commercial distribution of them.

On this appeal two questions are presented. First, whether Code 18.1-236.3 is unconstitutional, and second, whether the evidence adduced at the hearing was sufficient to support the court's adjudication that the magazines were obscene.

The Supreme Court of the United States has held that obscenity is beyond the protection of the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957). Code §18.1-236.3 provides a judicial procedure for adjudicting whether material is obscene or not. It is not a criminal proceeding. The constitutional attack on this statute is that it does not provide for a jury trial, permits a prior restraint on literary material, provides a community standard for adjudg-

ing obscenity rather than a national standard and is vague in violation of the Constitution. We find no merit to any of these alleged constitutional infirmities.

Counsel for appellants admits there has been no ruling by the Supreme Court requiring a jury trial in a proceeding of this kind. Since Code § 18.1-236.3 was not in force when the Constitution of the United States was adopted, a jury trial is not constitutionally required. Bowman v. Va. State Entomologist, 128 Va. 351, 372, 105 S.E. 141, 148 (1920).

Appellants assert the narrow contention that prior restraint or literary material violates the First Amendment. The statute in question does permit the issuance of a temporary restraining order upon four days' notice, after the court has found probable cause to believe the material is obscene and has issued a show cause order. But, no temporary restraining order was issued in this case. Even so, all prior restraint is not necessarily prohibited. *Times Film Corp. v. Chicago,* 365 U.S. 43 (1961). *See also Freedman v. Maryland,* 380 U.S. 51 (1965) and *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971).

The Supreme Court has not ruled on the question whether the standard for judging obscenity should be a community or national standard.[1] We are of opinion that a community standard is the proper standard. In light of the diversity of opinion that exists in our nation, it would be impossible to establish a workable national standard. See Chief Justice Warren's dissenting opinion in *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

Finally, the statute is not unconstitutional on account of vagueness. It provides a definite procedure for determining whether certain materials alleged to be obscene are, in fact, obscene. If the material is adjudged to be obscene then it is perfectly proper to restrain its sale or distribution.

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[1] According to the Attorney General, the issue of Community standard versus national standard is pending before the Supreme Court in *Miller v. California,* 401 U.S. 992 (1971).

With regard to the court's ruling that the magazines are obscene, we find that the evidence was sufficient to support that ruling. An expert witness for the Commonwealth testified concerning the community's standard for judging obscene material. He had reviewed the magazines in questio and said they did not meet the community standard. Further, the court itself viewed all the magazines in question and found them to be obscene in light of the community standards.

During oral argument, we invited appellants' counsel to point out which magazines were not obscene. He candidly admitted he had not reviewed all the magazines and was unable to say which ones were not obscene.

The judgment appealed from is

Affirmed.

VIRGINIA:

IN THE COURT OF HUSTINGS
FOR THE CITY OF PORTSMOUTH

IN THE MATTER OF
A NUMBER OF OBSCENE BOOKS

PETITION FOR ORDER TO DECLARE BOOKS OBSCENE PURSUANT TO SEC. 18.1-236.3 of the Code of Virginia, 1950, as amended

PETITION FOR ORDER TO DECLARE
BOOKS OBSCENE PURSUANT TO
SECTION 18.1-236.3 of the
Code of Virginia, 1950,
as amended

The undersigned Petitioner respectfully represents as follows:

1. The petitioner is the Attorney for the Commonwealth for the City of Portsmouth, Virginia.

2. The petitioner has reasonable cause to believe that Howard Alexander and Frank Collier are engaged in the sale and commercial distribution of a number of obscene books at their place of business at 513 High Street in the City of Portsmouth, Virginia.

3. The said books are listed by nmae or title and publisher, were known, on the attached sheets which are made a part hereof.

4. The said books picture the totally nude body of males and females. The genitals of thy males and females are exposed with the focal point of the pictures o the genitals. Many of the said pictures include more than one nude figure, either of the same sex or a different sex, in poses suggestive of human copulation or of abnormal sexual activity.

WHEREFORE, your Petitioner prays that the said books be adjudged obscene; and that a temporary restraining order be issued against the sale or distribution of the said books.

Von L. Piersall, Jr.
Commonwealth's Attorney for
the City of Portsmouth

PETITION FOR ORDER TEMPORARILY RESTRAINING THE SALE OR DISTRIBUTION OF CERTAIN BOOKS

The undersigned Petitoner respectfully represents as follows:

1. The Petitioner is the Attorney for the Commonwealth for the City of Portsmouth and is Petitioner in a matter on the Law Docket numbered 6244, concerning certain alleged obscene books.

2. These alleged obscene books are more fully named by title in a show cause order in the papers of the aforementioned Petition.

3. These said books have been examined by the Court and on this the 3rd day of June, 1970 the Court has issued an Order to Show cause why these books should not be adjudicated obscene, pursuant to Article 3, Chapter 4, Title 18.1 of the Code of Virginia, 1950 as amended.

Wherefore, your Petitioner prays that this Honorable Court issue an Order temporarily restraining the sale or distribution of the said books in accordance with the aforementioned Article, Chapter and Title of the Code of Virginia.

Von L. Piersall, Jr.
Commonwealth's Attorney for
the City of Portsmouth

NOTICE

TO:

Howard Alexander
c/o Village Books, Inc.
121 Brook Avenue
Norfolk, Virginia

Frank Collier
513 High Street
Portsmouth, Virginia

Take notice that the Commonwealth's Attorney did, on the 3rd day of June, 1970, file in The Court of Hustings for the City of Portsmouth a petition for a temporary restraining order against the sale or distribution of certain books alleged to be obscene, which books are more fully described by title and publisher in a show cause order issued by Judge R. Winston Bain of The Court of Hustings for the City of Portsmouth on June 3, 1970 and prior to the filing of the aforementioned petition.

You are further notified that the undersigned will appear before Judge R. Winston Bain of The Court of Hustings of said City on June 12, 1970, at 10:00 o'clock a.m., or as soon thereafter as the business of the Court will permit, and will ask the Court to issue a temporary restraining order against the sale or distribution of the aforementioned books, pursuant to Article 3, Chapter 4, Title 18.1 of the Code of Virginia, 1950, as amended.

Dated June 3, 1970.

Von L. Piersall, Jr.
Attorney for the Commonwealth
of the City of Portsmouth

SHOW CAUSE ORDER

On May 19, 1970, came Von L. Piersall, Jr., Attorney fo; the Commonwealth for the City of Portsmouth, and by petition moved that certain allegedly obscene books be adjudged obscene in accordance with the procedure set out in Sec. 18.1-236.3 of the Code of Virginia, 1950, as amended.

The Court having forthwith examined the aforementioned books, doth find probable cause to believe certain of said books to be obscene, which books are more precisely described by title and publisher, if known, on a list attached hereto and made a part hereof; It Is Therefore Ordered that a copy of this Order be published once a week for two successive weeks in the Ledger-Star, a newspaper of general circulation in the City of Portsmouth, and be served by registered mail upon the said publishers of said books, where address known, and on Howard Alexander and Frank Collier, and these persons and all others who are interested in the sale or commercial distribution of these books and all other interested parties who may be unknown may appear on the date this Order is returnable to show cause why these books should not be adjudicated obscene. And this Order to Show Cause shall be returnable at 10:00 A.M. on Friday, July 17, 1970.

Amateur Jaybird	Jaybird Enterprises	No. 5
Annie	White Stag Pub. Co.	
Adult Movies Illustrated	Classic Publications	Vol. 3 No. 5
Act One	Tudor House, Inc.	
After Hours	Classic Publications	Vol. 5 No. 2
About Face	Tudor House Pub.	No. 1
Affair	Jaybird Enterprises	Vol. 6, No. 4
All New '69 Nudies	Tudor House Pub.	No. 1
All New '69 Nudies	Tudor House Pub.	No. 2
Butch Tricks	None	
Beautiful Boys	The Dom	Vol. 1 No. 1
Black Hose	Dominion Pub. Co.	No. 14
Boys & Men in Uniform	Overstock Book Co.	
Big Boys	None	No. 11
Broad Tales		No. 5
Brazen Confessions	Star Distributors	
Black Lashes	None	No. 1
Break Thru	Jaybird Enterprises	No. 5
Belles in Colour	Wyngate & Bevins, Inc.	No. 6
Belly Button	Calga Pub., Inc.	Vol. 1 No. 1
Black and Sexy	Tudor House, Inc.	No. 2
Baby Cake	Tudor House, Inc.	No. 2
Busy Body	Tudor House, Inc.	No. 1
Black Beautiful		No. 14
Broad View	Press Arts, Inc.	No. 22
Black Silk Stockings	Classic Pub.	Vol. 5 No. 3
Bunny No. 1	Sunshine Enterprises	No. 1
Body Shop	Jaybird Enterprises	Vol. 7 No. 1
Broadside	Jaybird Enterprises	No. 5 Vol. 3
Boy Friends	Pendulum Pub.	Vol. 2 No. 2
Bottom	Jaybird Enterprises	Vol. 1 No. 2
Blazing Films	Pendulum Press	Vol. 4 No. 1
Baal	None	Special No. 3
Copper Cuties	Dominion Pub. Co.	No. 13
Copper Cuties	Dominion Pub. Co.	Vol. 1 No. 2
Cinerotic	Orbit Pub.	Vol. 3 No. 3
Cinema Keyhole	Classic Pub.	Vol. 1 No. 4
Cinema Keyhole	Orbit Pub.	Vol. 2 No. 1

Color Special		No. 11
Cinema Searcher		Vol. 1 No. 5
Cupie Dolls	E.L. Pub. Co.	No. 1
Candy	Tudor House, Inc.	No. 1
Christina	E.L. Pub. Co.	No. 1
Cuddleup	E.L. Pub. Co.	No. 1
Campus Jaybird	Jaybird Enterprises, Inc.	No. 6
Cinema Scorchers	Classic Pub.	Vol. 2 No. 1
Cinema Scorchers	Classic Pub.	Vol. 1 No. 2
The Continental Spectator	.	Vol. 4 No. 9
Champagne	Jaybird Enterprises, Inc.	Vol. 7 No. 3
Cocktail	Jaybird Enterprises	Vol. 9 No. 4
Celluloid Capers	Dominion Pub. Co.	Vol. 1 No. 7
Cuddles No. 1	Sunshine Enterprises	No. 1
Cici	Tudor House Pub.	Collector's Issue No. 1
Cupcake	None	
Cover Girl	Nordick Bladcentral A/S	All issues
Duet Edition 1	Tudor House Pub.	
Dimples	Tudor House Pub.	
Dahlings	CAJ Enterprises	
Dover Girl	Unknown	All issues
Dolly	D.M.F.-Forlaget	All issues
Daring Films	Obit Publications	Vol. 3 No. 5
Daring Films	Classic Publications	Vol. 4 No. 4
Dynamic Films	Pendulum Press	Vol. 4 No. 1
Domino	A.B. Gammla-Stand Press	Vol. 1 No. 1
Dingle Dangle No. 3	Phoenix Pub., Ltd.	Vol. 3
Double Pleasure	Tudor House Pub.	
Dears & Rears No. 4	Tudor House Pub.	No. 4
Exciting	Nordisk Bladcentral A/S	All issues
Exclusive in Color	Nordisk Bladcentral A/S	All issues
Eclipse	Phoenix Pub., Ltd.	Vol. 1 No. 4
Eclipse	Phoenix Pub., Ltd.	Vol. 1 No. 3
Erick	None	No. 1
Ecstasy	Feature Pub.	Vol. 1 No. 11
Ecstasy	Pendulum Pub., Inc.	Vol. 2 No. 1
Edie	Tudor House Pub.	No. 1
Eve's Rib	Jaybird Enterprises	Vol. 1 No. 4

The Erotic Cinema	Orbit Publications	Vol. 1 No. 1
The Erotic		Vol. 1 No. 2
Flaming Films	Dominion Pub. Co.	
Fanny	D.M.F.-Forlaget	All issues
Fancy	ABC Publishers	All issues
Femina	Parliament Publications	Vol. 1 No. 2
Fred	Overstock Book Co.	Series #3
Flaming Films	Dominion Pub. Co.	No. 13
Fiery Films	Classic Publications	Vol. 3 No. 4
Fiery Films	Orbit Publications	Vol. 3 No. 3
Film Inferno	Classic Publications	Vol. 1 No. 3
Film & Figures	Jaybird Enterprises, Inc.	No. 18
Frisky	Tudor House, Inc.	No. 1
Fun & Games	Pendulum Press	Vol. 2 No. 1
French Frills	Jaybird Enterprises, Inc.	Vol. 9 No. 1
Frenchette	Tudor House Pub.	
Fancy Pants	Tudor House Pub.	
Fifi	Tudor House Pub.	
Fantasia	None	Issue No. 1
5 in a Barn	None	
Girl Companions	Nordick Bladcentral A/S	All issues
Gloria	Dominion Pub. Co.	No. 10
Gloria	White Stag Pub. Co.	No. 11
Groovy Girls	Dominion Pub. Co.	No. 10
Garber Girls	Pendulum Press	Vol. 4 No. 1
Gay Mood	Tudor House, Inc.	No. 1
Gaetano No. 1	Gaetano	No. 1
Going Steady	Foto-Form Publications	No. 1
Groovy Nudists	May Publishing Co.	No. 2
Gigi	Tudor House Pub.	
Gold Diggers	Pendulum Press	Vol. 2 No. 1
Golden Garter	None	No. 2
The Girl Next Door	Dominion Pub. Co.	No. 1
Hardrock	None	No. 2
Honeymooners	Tudor House, Inc.	No. 2
Honeymooners	Tudor House, Inc.	No. 1
Hit Fun	Calga Pub., Inc.	Vol. 1 No. 1
High Jinx	Jaybird Enterprises, Inc.	Vol. 1 No. 2

Heads Up	Pendulum Press	Vol. 2 No. 1
Husky	None	No. 3
His & Hers	Jaybird Enterprises, Inc.	No. 6
The Hustler	None	No. 1
Intima	Phoenix Pub., Lts.	Vol. 1 No. 2
In Nudist	Dominion Pub. Co.	No. 10
Informal	Tudor House Pub.	
In Private	AB Gammonla-Stand Press	Vol. 1 No. 1
Ingenue	None	Issue No. 1
Intimate Confessions	None	Vol. 1 No. 1
Jaybird Experiences	Jaybird Enterprises, Inc.	No. 13
Joy	White Stag Pub. Co.	No. 1
Jade, the Color Magazine	None	Vol. 1 No. 1
Jaybird Swingers	Jaybird Enterprises, Inc.	No. 1
Jaybird Journal	Jaybird Enterprises, Inc.	No. 19
Jaybird Happening	Jaybird Enterprises, Inc.	No. 26
Jaybird Happening	Jaybird Enterprises, Inc.	No. 25
Jaybird U.S.A.	Jaybird Enterprises, Inc.	No. 17
Jaybird Scene	Jaybird Enterprises, Inc.	No. 5
The Jaybird Era	Jaybird Enterprises, Inc.	No. 3
King & Queens	Tudor House, Inc.	
Kick		Vol. 1 No. 2
Karen	White Stag Pub. Co.	No. 9
Kim	Tudor House, Inc.	No. 1
Kitty	Tudor House, Inc.	No. 1
King & Queens	Tudor House, Inc.	No. 1
Kozy Kids	Tudor House, Inc.	No. 1
Kookie	Marquis Publishing	Vol. 1 No. 1
Lovely	Triol AB Kanaltorget 1	All issues
Ladies	Triol AB Kanaltorget 1	All issues
Loving Couples	Phoenix Publishers, Ltd.	Collecgor's Edition
Libertine 3	Phoenix Publishers, Ltd.	
Lolly Pops	Tudor House, Inc.	No. 1
Lookers	Mecca Magazine	No. 1
Lusty	Mecca Magazine	No. 1
Love Me	Calga Publishers, Inc.	Vol. 1 No. 1
Lovebird	Tudor House, Inc.	No. 2
Lovers #2	Tudor House, Inc.	No. 2

Lovers #1	Tudor House, Inc.	No. 1
Late Show	Jaybird Enterprises, Inc.	Vol. 7 No. 3
Late Date	Jaybird Enterprises, Inc.	Vol. 7 No. 2
Luv	None	
Love Date		Vol. 1 No. 1
Limbo	None	
The McCoy	None	Issue No. 1
Mustang	None	No. 1
Marilyn	Scandinavian Art Magazine (dist. by Central Mag. Sales, Ltd.)	All issues
Male Nudes	None	No. 5
Midnight	Jaybird Enterprises, Inc.	Vol. 8 No. 4
Muff	T.R. Press, Inc.	No. 2
Ming	Tudor House Pub.	No. 1
Make Out	Star Distributors	Vol. 1 No. 1
Michelle No. 1	Sunshine Enterprises	No. 1
Missie No. 1	Sunshine Enterprises	No. 1
Mamas		Vol. 2 No. 6
Mode	None	Issue No. 1
Madames	C A J Enterprises	
The Male Swinger	None	No. 5
New Directions	Jaybird Enterprises, Inc.	No. 17
Nudist Youth	Dominion Pub. Co.	No. 14
Nude Epic	Dominion Pub. Co.	
Nudist Photography	Dominion Pub. Co.	No. 7
Nude Reflections		No. 2
Nude Rhapsody	Calga Pub., Inc.	No. 1
Nudist Studio Review		No. 1
Novarro	Guild Press, Ltd.	No. 105
Nude Explorations	White Stag Pub. Co.	No. 15
Nude Era	Concorde Pub. Co.	Vol. 1 No. 4
Nude Rebels	Pendulum Press	Vol. 1 No. 2
The Nudist Idea	Elysium, Inc.	No. 20
Naked Love	Phoenix Pub., Ltd.	
The New Touch	Jaybird Enterprises, Inc.	Vol. 1 No. 2
Naked Breakout	Jaybird Enterprises, Inc.	Vol. 1 No. 2
Nudist Youth		No. 13
Naked Place	Venice Pub. Corp.	No. 3

Nudism Today	Elysium, Inc.	No. 38
Nude Trip	Modern Nudist Asso.	No. 29
Nude Lark	Elysium, Inc.	
Nude Image No. 24	Jaybird Enterprises, Inc.	No. 24
Nudie Fox F	Sun-Air Pub. Co.	Vol. 1 No. 4
Nudist Idea 20		No. 20
The Nude World	R.N.S. Publishing	Vol. 1 No. 1
Nude Living	Elysium, Inc.	No. 58
Nylon Party	Jaybird Enterprises, Inc.	Vol. 6 No. 4
Naked House Parties	Jaybird Enterprises, Inc.	No. 1
National Registry	Tudor House Pub.	Issue No. 3
Night Crawlers No. 1	Tudor House Pub.	No. 1
Naked Now		No. 9
New Directions		No. 16
Nudist Tempo	House of Price	Vol. 1 No. 2
Naked Confessions	None	
Over Twenty-One	E.L. Pub. Co., Inc.	No. 1
One Plus One	Pendulum Pub., Inc.	Vol. 2 No. 1
Orpheus	None	Special No. 2
Phallic Development	Media Arts	
Phallic Development in Mature Adult	Media Arts	
Phallic Development in Young Adult	Media Arts	
Private Films	Jaybird Enterprises, Inc.	Vol. 1 No. 3
Private Films	Jaybird Enterprises, Inc.	Vol. 1 No. 2
Pearl, the All Color Magazine	None	Vol. 1 No. 1
Psych It To Me	Phoenix Pub., Ltd.	No. 4
Pendulum	Pendulum Pub., Inc.	Vol. 2 No. 2
Partners	Tudor House, Inc.	No. 2
Party Pair	Tudor House Pub.	No. 1
Party Pair	Tudor House Pub.	No. 1 Ed. 1
Partners	Tudor House Pub.	No. 1
Play Time	Star Distributors	
Pleasure Seekers	Action Pub. Service	Issue 7 Vol. 2 No. 3
Petite	Tudor House, Inc.	
Peek	Tudor House Pub.	
Private Sexational	None	Vol. No. 2

Pussy Willow		Vol. 2 No. 2
Quickie	Jaybird Enterprises, Inc.	Vol. 7 No. 2
Rebel	Tudor House Pub.	Issue No. 1
Rene	Tudor House Pub.	Collector's Iss. No. 1
Rhapsody		No. 6
Ramrod	None	
Romp Set		May '69
Ruby, The Golden Series	None	Vol. 1 No. 1
Raw Confessions	None	Vol. 1 No. 2
Rex		No. 1
Roulette		Vol. 3 No. 4
Rare Mood	Tudor House, Inc.	
Round the World Girls in THP	Tudor House, Inc.	
Shocking Screen	Dominion Pub. Co.	Vol. 1 No. 3
Shocking Screen	Dominion Pub. Co.	No. 8
Sexy	ABC Publishers	All issues
Sun Buffs	Triumph News Co.	No. 8
Skin Film	AB Gammla-Stand Press	Vol. 1 No. 1
Secret Hours	Jaybird Enterprises, Inc.	Vol. 7 No. 4
Springtime Youth	Calafram Enterprises, Inc.	No. 2
Sandrina	Scandinavian Art Mag.	All copies
Sunlane	Dominion Pub. Co.	No. 5
Sixty Nine Hours with Michelle	Jaybird Enter.	Vol. 2 No. 1
Sun West	Dominion Pub. Co.	No. 14
Sun West	Dominion Pub. Co.	No. 13
Sol Guest	Dominion Pub. Co.	No. 10
Sumpin Different	Tudor House, Inc.	
Snap	Jaybird Enter., Inc.	Vol. 9 No. 2
Swap	Pendulum Press	Vol. 4 No. 4
Savage Sex	Pendulum Press	Vol. 2 No. 1
Skin Film		Vol. 1 No. 1
Suburban Jaybird	Jaybird Enter., Inc.	No. 6
Sun Buffs	Triumph News Co., Inc.	Vol. 1 No. 3
Sun Flair	Sun-Air Pub. Co.	Vol. 1 No. 3
Sundisk	Elysium, Inc.	No. 6
Sunrise	Elysium, Inc.	

Sol 70	Jaybird Enter., Inc.	No. 23
Swing Modern	Press Arts, Inc.	Vol. 1 No. 1
Sex Romances	Pegasus Productions	
Sex Confidential	Pegasus Productions	
Switch Hitters	Calga Pub., Inc.	Vol. 1 No. 1
The Seekers	Seekers, Inc.	Iss. 4 No. 2191C N.Y.
Splits	Tudor House Pub.	
Searchers		Vol. 2 No. 1
Searchers		Vol. 1 No. 2
Sissy No. 1	CAJ Enterprises	No. 1
Searchers		Vol. 1 No. 3
Solo	Jaybird Enterprises, Inc.	Vol. 1 No. 3
Savage Sex		Vol. 2 No. 1
Sissie		
Sisters		Issue No. 1
Solar Scene	Orbit Publications	Vol. 2 No. 1
True Nudist	Dominion Pub. Co.	
21	Jaybird Enterprises, Inc.	Vol. 2 No. 3
Teen Nude	None	Vol. 1
38/26/34	Jaybird Enterprises, Inc.	Vol. 7 No. 2
Times Square Faces	None	No. 1
Times Square Faces	None	No. 2
Tulip Review	None	
Tomcat	Dominion Pub. Co.	No. 2
Tease	Classic Publications	Vol. 2 No. 5
Torrid Film Reviews	Orbit Publications	Vol. 3 No. 3
Tina	White Stag Pub. Co.	No. 10
Taurus		
Throttle	None	
Tip Top	Jaybird Enterprises, Inc.	Vol. 9 No. 2
Tootsie	Tudor House Pub.	No. 1
Togetherness	Tudor House Pub.	No. 2
Touch and Go	Tudor House Pub.	No. 1
Two Much	Tudor House Pub.	No. 2
The Thouchables	Foto-Form Pub.	No. 1
Tip to Bottom No. 3	Phoenix Pub., Ltd.	No. 3
Tonight		Vol. 8 No. 4
The Three Little Bares	Tudor House Pub.	

Touch		Iss. No. 1, Collector's Item
Tracey	None	Issue No. 1
Topaz, the Color Magazine	None	Vol. 1 No. 1
Underground Photo Album	Lunar Press	
Up Tight No. 2	Tudor House Pub.	No. 2
Up Tight No. 1	Tudor House Pub.	No. 1
Urban Jaybird	Jaybird Enter., Inc.	No. 3
Vivian	Scandinavian Art Mag.	All copies
Vickings	AB Gammla-Stand Press	Vol. 1 No. 1
Wonder Girl	Sunshine Enter.	Collector's Issue No. 1
Wild Screen Reviews	Classic Pub.	Vol. 1 No. 1
Wildest Films	Orbit Pub.	Vol. 3 No. 4
Wild 'n Sassy	Tudor House Pub.	No. 1
Warm Up		No. 1
Wildest		Vol. 4 No. 2
Weekend Jaybird No. 18	Jaybird Enterprises, Inc.	
Weekend Jaybird No. 19	Jaybird Enterprises, Inc.	
X Films	Dominion Pub. Co.	No. 14
X Films	Dominion Pub. Co.	No. 13
Youth in Art	None	No. 1
Youth in Art	None	No. 2
Youth in Art	None	No. 3
Youth in Art	None	No. 4
Young Mavericks	Pendulum Pub.	No. 1
Young Beavers	Pendulum Press	Vol. 4 No. 2
Young Stuff	Tudor House Pub.	No. 2
Young Stuff		No. 1
Yum Yum	Tudor House Pub.	No. 2
Yum Yum		No. 1
Your Jaybird Horoscope '70	Jaybird Enter., Inc.	No. 1
Zoom	Tudor House Pub.	
Zulu	Tudor House Pub.	
Zodiac	Guild Press, Ltd.	

VIRGINIA: IN THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH IN THE MATTER OF A NUMBER OF OBSCENE BOOKS

PETITION FOR ORDER TO DECLARE BOOKS OBSCENE PURSUANT TO SEC. 18.1-236.3 OF THE CODE OF VIRGINIA, 1950, AS AMENDED

MEMORANDUM

November 20, 1970

This matter came on to be heard on November 4, 1970, at which time the Commonwealth put on three expert witnesses and introduced as evidence the magazines in question. On the next day, the Commonwealth rested and the Defense put on three expert witnesses. The Court then took the matter under advisement.

The three (3) tests for obscenity as set forth by the Supreme Court of the United States in the case of Redrup, Petitioner v. State of New York, 386US767, are as follows:

(1) Whether or not the dominant theme of the material taken as a whole appeals to a prurient interest in sex.

(2) Whether or not the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

(3) Whether or not the material is utterly without redeeming social value or importance.

The Court having viewed all the magainzes in question, and reviewed the cases cited by Counsel, feels that the magazines' dominant theme taken as a whole appeals to a prurient interest in sex; that they are patently offensive because they do affront contemporary community standards relating to the description or representation of sexual matters; and that the magazines are utterly without redeeming social value.

It further is the judgment of the Court that said magazines have no artistic, literary, medical, scientific, cultural or educational values considered as a whole. Thusly, it is the opinion of the Court that the said magazines are abscene.

The Commonwealth's Attorney is directed to prepare an Order adjudging the said magazines obscene and restraining the sale or distribution thereof.

/s/
Associate Judge

THE COURT OF HUSTINGS
For The
CITY OF PORTSMOUTH
Portsmouth, Virginia

January 8, 1971

Mr. Stanley M. Dietz
Attorney at Law
1029 Vermont Avenue, N.W.
Suite 502
Washington, D.C. 20005

Mr. James Power
Attorney at Law
1412 Maritime Tower
234 Monticello Avenue
Norfolk, Virginia 23510

Re: Petition for Order to Declare Books Obscene, Pursuant to Section 18.1-236.3 of the Code of Virginia, 1950, as amended

Gentlemen:

Enclosed herewith is copy of Order I entered in the above-styled matter on December 30, 1970.

Wishing each of you a happy and prosperous New Year, I remain,

Yours very truly,
R. Winston Bain

R.W.B/lmj
Enclosure

VIRGINIA: IN THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

IN THE MATTER OF A NUMBER OF BOOKS ALLEGED TO BE OBSCENE PURSUANT TO SECTION 18.1-236.3 OF THE CODE OF VIRGINIA OF 1950, AS AMENDED

ORDER

It appearing to the Court that on May 19, 1970, Von L. Piersall, Jr., Attorney for the Commonwealth for the City of Portsmouth, by petition moved that certain books be adjudged obscene in accordance with the procedure as set out in Sec. 18.1-236.3 of the Code of Virginia (1950) as amended.

And upon this said petition and in accordance with the procedure in said Virginia Code Section the Court examined all of the books or magazines in question and did on the 3rd day of June, 1970, issue an Order to Show Cause why certain of the books or magazines in question should not be adjudicated obscene.

And it further appearing that Howard Alexander and Frank Collier and Village Books, Inc. and Media Arts and Guild Press, Ltd. by counsel, Stanley M. Dietz and James B. Powers, did file an answer to said petition on July 30, 1970; upon which said pleadings the cause came on to be heard on the 4th and 5th days of November, 1970, and the Court having received evidence, including testimony of experts pertaining to the obscene nature and character of the books or magazines in question and named in the

aforesaid pleadings, did make a written determination upon every such consideration relied upon in the proceedings.

It Is Therefore ADJUDGED and ORDERED in accordance with the Court's findings as set out in its written memorandum that the magazines listed in the Order to Show Cause aforementioned be and they are hereby declared obscene; and the said Howard Alexander, Frank Collier and Village Books, Inc. and Media Arts and Guild Press, Ltd., are hereby restrained from either the sale or commercial disposition of the aforementioned magazines.

A Copy Teste: Cecil W. Johnson, Clerk
By: Linda M. Jeffries, D.C.

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§ 18.1-236 CRIMES AND OFFENSES GENERALLY § 18.1-236.3

§ 18.1-236. Indecent exposure.—every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a misdemeanor. (1960, c. 233.)

§ 18.1-236.3 Proceeding against book alleged to be obscene.—

(1) Whenever he has reasonable cause to believe that any person is engaged in the sale or commercial distribution of any obscene book, any citizen or the attorney for the Commonwealth of any county or city, or city attorney in which the sale or commercial distribution of such book occurs may institute a proceeding in any court of record in said city or county for adjudication of the obscenity of the book.

(2) The proceeding shall be instituted by filing with the court a petition

(a) directed against the book by name or description;

(b) alleging the obscene nature of the book, and

(c) listing the names and addresses, if known, of the author, publisher, and all other persons interested in its sale or commercial distribution.

(3) Upon the filing of a petition pursuant to this article, the court in term or in vacation shall forthwith examine the book alleged to be obscene. If the court had no probable cause to believe the book obscene, the judge thereof shall dismiss the petition; but if the court find probable cause to believe the book obscene, the judge thereof shall issue an order to show cause why the book should not be adjudicated obscene.

(4) The order to show cause shall be:

(a) directed against the book by name or description;

(b) published once a week for two successive weeks in a newspaper of general circulation within the county or city in which the proceeding is filed;

(c) if their names and addresses are known, served by registered mail upon the author, publisher, and all other persons interested in the sale or commercial distribution of the book; and

(d) returnable twenty-one days after its service by registered mail or the commencement of its publication, whichever is later.

(5) When an order to show cause is issued pursuant to this article, and upon four days' notice to be given to the persons and in the manner prescribed by the court, the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

(6) On or before the return date specified in the order to show cause, the author, publisher, and any person interested in the sale or commercial distribution of the book may appear and file an answer. The court may by order permit any other person to appear and file an answer amicus curiae.

(7) If no one appears and files an answer on or before the return date specified in the order to show cause, the court, upon being satisfied that the book is obscene, shall order the clerk of court to enter judgment that the book is obscene, but the court in its discretion may except from its judgment a restricted category of persons to whom the book is not obscene.

(8) If an appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing. The court shall conduct the hearing in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury. At the hearing, the court shall receive evidence, including the testimony of experts, if such evidence be offered, pertaining to:

(a) the artistic, literary, medical, scientific, cultural and educational values, if any, of the book considered as a

(b) the degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought;

(c) the intent of the author and publisher of the book?

(d) the reputation of the author and publisher;

(e) the advertising, promotion, and other circumstances relating to the sale of the book;

(f) the nature of classes of persons, including scholars, scientists, and physicians, for whom the book may not have prurient appeal, and who may be subject to exception pursuant to subsection (7).

(9) In making a decision on the obscenity of the book, the court shall consider, among other things, the evidence offered pursuant to subsection (8), if any, and shall make a written determination upon every such consideration relied upon in the proceeding in his findings of act and conclusions of law or in a memorandum accompanying them.

(10) If he finds the book not obscene, the court shall order the clerk of court to enter judgment accordingly. If

he finds the book obscene, the court shall order the clerk of court to enter judgment that the book is obscene, but the court, in its discretion, may except from its judgment a restricted category of persons to whom the book is not obscene.

(11) While a temporary restraining order made pursuant to subsection (5) is in effect, or after the entry of a judgment pursuant to subsection (7), or after the entry of judgment pursuant to subsection (1), any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute to exhibit the book, is presumed to have knowledge that the book is obscene under §§ 18.1-227 through 18.1-233 of this article.

(12) Any party to the proceeding, including the petitioner, may appeal from the judgment of the court to the Supreme Court of Appeals of Virginia, as otherwise provided by law.

(13) It is expressly provided that the petition and proceeding authorized under this article, relating to books alleged to be obscene, shall be intended only to establish scienter in cases where the establishment of such scienter is thought to be useful or desirable by the petitioner; and the provisions of § 18.1-236.3 shall in nowise be construed to be a necessary prerequisite to the filing of criminal charges under this article. (1960, c. 233.)

AMENDMENTS TO THE CONSTITUTION.[9]

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

* * * * *

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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[9]The first ten amendments were all proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

[AMENDMENT VII]

[Trial by Jury in Civil Cases]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

* * * * *

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Supreme Court of the United States

October Term, 1971

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS, INC., MEDIA ARTS, AND GUILD PRESS, LTD.

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE OF RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Virginia is recorded in 212 Va. 554, 186 S.E.2d 43 (1972).

QUESTIONS PRESENTED

1. Is § 18.1-236.3, of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging obscenity rather than a national community standard, and by providing for establishing a fact, through civil pro-

ceedings, for use in criminal prosecution, all in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

2. Are the approximately 300 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense, without sale or exhibition to juveniles, obstrusive advertising or pandering?

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth's Attorney of the City of Portsmouth presented a petition to the Hustings Court asking that certain books named in the petition be adjudged obscene as set forth in § 18.1-236.3 of the Code of Virginia. The Hustings Court issued a writ of subpoena duces tecum returnable on May 22, 1970, at which time the appellants produced copies of the named books. A motion to quash the subpoena duces tecum was overruled and the books were left in the cutsody of the Court. On June 3, 1970, the Hustings Court issued a rule to show cause why the books should not be adjudicated obscene. On June 12, 1970, the appellants appeared through counsel and moved for a stay of the proceedings which was denied. The appellants filed an answer to the petition and a motion to dismiss the petition, which was heard by the Court on August 19, 1970. Following the denial of the appellants' motion to dismiss, the case was tried by the Court on November 4 and 5, 1970.

At the commencement of the trial on November 4, 1970, it was stipulated that the appellants' book store did not sell or distribute any literature to juveniles (T.3). In addition, the Court directed the return of those books which it had previously determined that there was no probable cause to believe they were obscene (T. 9). The first witness to testify

on behalf of the Commonwealth was Robert Holley, a resident of the City of Portsmouth for fifteen years (T. 6). Mr. Holley testified that five to seven years before he had served as chairman of an area wide Chamber of Commerce committee composed of representatives of Norfolk, Virginia Beach, Portsmouth, Newport News, Suffolk, and Nansemond County, the purpose of the committee being to investigate obscene matters in the area (T. 9 & 13). The committee purchased magazines from different locations throughout the community and by discussing the magazines with civic groups and organizations, the committee was able to determine what the community standard was throughout the whole area (T. 10). About a year and a half prior to trial, Mr. Holley did extensive investigation into obscenity in the Portsmouth area and by sampling contacted the equivalent of 30,000 people in the Portsmouth area (T. 10 & 13). During this time Mr. Holley met with various clubs and organizations in the area and displayed magazines and films depicting sexual portrayals of all types. These clubs included the Navy wives clubs, which included persons from various parts of the country (T. 14). During this investigation, Mr. Holley was not only able to determine what the community standard was, but also formed the opinion that the local standard was essentially the same as the national standard. His opinion concerning the national standard was based upon his travels on the East Coast and in talking with people from throughout the country (T. 15, 21, 23). Upon this background, Mr. Holley was considered as an expert witness and allowed by the Court to testify (T. 37). Mr. Holley testified that he had examined each of the books in question (T. 38), and that in his opinion the majority of the books were patently offensive and did not meet the community standard (T. 46).

Mr. Holley also testified that the books taken as a whole appealed to prurient interest in sex and the majority of the books did not have any redeeming social value (T. 46, 47). Mr. Holley did state that he did not consider nudity alone as violating the community standard, but that nude persons in suggestive poses depicting sexual intercourse or sodomy did violate the community standard (T. 57, 58).

The Commonwealth, next offered the testimony of Dr. Donald Lee Mingione. Dr. Mingione specializes in the field of psychiatry and has been practicing in Portsmouth for nine years (T. 60). Dr. Mingoine was qualified as an expert psychiatrist and was qualified to testify concerning social values (T. 67-70). Dr. Mingione testified that he had examined each of the books in question (T. 60) and in his opinion the majority, if not all of the books, appealed to the prurient interest (T. 64). He further testified that none of the books possessed any redeeming social value (T. 70).

The Commonwealth then introduced Richard Messenger who stated that he was the owner of Messenger Printing Company, had lived in Portsmouth for forty-three years and been in the printing business for twenty years (T. 81, 82). Mr. Messenger testified that he does printing for the Government and firms outside the State of Virginia and also receives bulletins concerning what is to be printed and not to be printed in the obscenity field. Mr. Messenger also testified that he had attended meetings with other printers and publishers to discuss standards of printing obscene materials (T. 83, 84). Mr. Messenger examined all of the books in question (T. 83) and in his opinion they would appeal to the prurient interest (T. 86).

The appellants offered the testimony of Dr. Wilbur Hammond, a resident of Arlington, Virginia, who is engaged

in the private practice of medicine, specializing in psychiatry (T. 111). Dr. Hammond spent about ten minutes looking at from fifteen to twenty of the books (T. 125-127) and gave his opinion that the books involved would not appeal to the prurient interest (T. 116). Dr. Hammond based his conclusion on the fact that he had shown similar magazines to his patients and fellow doctors at St. Elizabeth's Hospital (T. 117). Dr. Hammond further testified that there are only a few items that would be entirely without redeeming social value and that hard core pornography would have some redeeming social value (T. 128, 129).

Thereafter the appellants presented the testimony of Dr. Donald W. Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital, in Cambridge, Maryland (T. 152), who was of the opinion that the books would not appeal to the prurient interest of the average individual (T. 154). Dr. Nachand testified that he had examined only approximately one-half of the books in question (T. 162). He further testified that he did not believe these books exceeded the community standards and that they probably had some socially redeeming value (T. 155-158). Dr. Nachand further testified that hard core pornography is not necessarily obscene (T. 185).

Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, testified that the books may appeal to the prurient interest of a group of people (T. 197). He further testified that he would not feel qualified to say what standards are relative to prurient interests for most people in that it differs from person to person and is an individual concept (T. 200-204). Dr. Kastner in answer to a question propounded by the Court, stated that the magazines might be considered obscene by a majority of the citizens (T. 207).

ARGUMENT

I.

Section 18.1-236.3 Of The Code Of Virginia Is Constitutional.

Petitioners first assert that § 18.1-236.3 (set forth in petitioners' petition Appendix pgs. 19a-21a), is unconstitutional in that it does not provide for trial by jury. Subsection 8 of this section specifically provides that the hearing shall be conducted by the court in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury.

Section 18.1-236.3 is not a criminal proceeding, but rather is an in rem proceeding. The petition is directed against the book or books considered to be obscene, and this section provides no criminal penalties. This proceeding is a creature of statute and was unknown at common law. It has long been well settled that neither the State nor Federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these constitutions were adopted. *Bowman* v. *Va. State Entomologist,* 128 Va. 351 (1920); 50 C.J.S., Juries § 10.

As a general rule, jury trials may be properly denied in purely statutory actions or proceedings. 47 Am. Jur. 2d, Jury, § 41.

Although the Supreme Court was not called upon to decide the issue of a jury trial in *Kingsley Books* v. *Brown,* 354 U.S. 436 (1957), it nevertheless approved a New York statute which set forth the procedure to enjoin the distribution of obscene books without the benefit of a jury trial. See also *Village Books, Inc.* v. *State's Attorney, Prince George's County,* 282 A.2d 126 (Md. 1971).

Petitioners next urge that the statute is unconstitutional in that it provides for a prior restraint without the benefit

of an adversary hearing. Subsection 5 provides that when an order to show cause is issued the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

This Court in *Freedman* v. *Maryland,* 380 U.S. 51 reemphasized its previous holding that prior restraint is not necessarily unconstitutional under all circumstances.

In the recent case of *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971), this Court had occasion to review its decision in *Freedman* as it applied to 19 USC § 1305 (a). In reviewing *Freedman,* this Court said it had struck down the state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58. This Court countinued that to insure a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, this Court further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "(a)ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) ". . . the procedure must also assure a prompt final judicial decision." Id. at 58-59.

Section 18.1-236.3 provides for just the type of judicial determination in an adversary proceeding envisioned in *Freedman.* In addition, this section provides that any prior restraint to preserve the status quo will be for a short fixed

period. Subsection 5 provides that when a show cause order is issued and upon four days' notice the court may issue a temporary restraining order. Subsection 4 (d) requires that the show cause order be returnable 21 days after service. Subsection 8 provides that if appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing.

For other discussions concerning the question of prior restraint see Prior Adversary Hearings on the Question of Obscenity, 70 Colum. L. Rev. 1403 (1970); The Prior Adversary Hearing: Solution to Procedural Due Process Problems in Obscenity Seizures? 46 N.Y. U.L. Rev. 80 (1971).

Petitioners further contend that § 18.1-236.3 is unconstitutional in that it establishes an improper standard of measuring contemporary community standards. Petitioners argue that a nation standard should apply whereas the code section provides for a local standard. The question of national versus local standards was argued before this Court on January 19, 1972, in *Miller* v. *California,* No. 70-73, and this Court's decision in that case will be dispositive of this issue. The respondent believes that it would be impossible to set a national standard and a community standard is the proper standard. See *State* v. *Henry,* 198 So.2d 889 (La. 1967); *Dixon* v. *Municipal Court of San Francisco,* 72 Cal. Rptr. 587 (1968); and *Jones* v. *Birmingham,* 224 So.2d 922 (Ala. 1969), cert. den. 396 U.S. 1011.

Petitioners lastly argue that § 18.1-236.3 is unconstitutionally vague in that it provides for establishing scienter for use in a criminal prosecution without affording the defendant his constitutional right to a trial by jury on all issues of fact in a criminal case, and further that while the section provides for a temporary restraining order it does

not provide for a permanent injunction. In the first instance § 18.1-236.3 is a proceeding to determine whether specified books are obscene and does not conclusively establish knowledge or scienter. The question of knowledge or scienter in a criminal prosecution would still be an issue to be resolved by a jury, and the proceedings under § 18.1-236.3 are merely intended as an aid in that determination where thought to be useful or desirable.

In the second place, once books have been determined to be obscene they are not entitled to the protection of the Constitution, *Roth* v. *United States,* 354 U.S. 476; *United States* v. *Reidel,* 402 U.S. 351 (1971), and it would appear logical that their distribution could be permanently enjoined.

II.

The Books And Magazines Are Obscene In The Constitutional Sense.

The petitioners contend that the judgment of the Court below was contrary to the law and evidence, and reply mainly upon *Redrup* v. *New York,* 386 U.S. 767 in which they say that this Court reaffirmed the prior definition of obscenity in *Roth, supra,* and added three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it; and (3) Pandering which was found in *Ginzburg.*

The Respondent submits that any such contention has been completely laid to rest, even if it ever had any validity.

In *United States* v. *Reidel, supra,* the defendant was charged with a violation of 18 USC § 1461, which prohibits the knowing use of the mails for the delivery of obscene matter. Reidel had advertised in the newspaper that a person seeking his illustrated booklet must be over 21 years of

age, and one of the booklets had been mailed to a postal inspector stipulated to be over 21. The District Court dismissed the indictment and concluded that § 1461 could not be constitutionally applied "where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults. . . ." This Court rejected the reasoning of the District Court and reversed the judgment. This Court held that *Roth* squarely placed obscenity and its distribution outside the reach of the First Amendment and refused to overrule *Roth*. This Court explicitedly held that whether the laws of obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age was a legislative matter.

The Respondent submits that the Court below applied the proper standard for determining obscenity as set forth in *Roth* and that the evidence was ample to support the finding that the books and magazines were obscene.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Respondent was mailed to Stanley M. Deitz, 1029 Vermont Avenue, N.W., Washington, D. C. 20005 on June 26, 1972.

JAMES E. KULP

Assistant Attorney General

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SUPREME COURT, U. S.
FILED
AUG 10 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER,
VILLAGE BOOKS INC., MEDIA ARTS,
and GUILD PRESS, LTD.

Petitioners

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITIONERS' BRIEF

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IN THE

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OCTOBER TERM, 1972

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS INC., MEDIA ARTS, and GUILD PRESS, LTD.

Petitioners

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITIONERS' BRIEF

OPINIONS BELOW

The unreported Memorandum of the Court of Hustings for the City of Portsmouth, dated November 20, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Appendix Page 16a. The Unreported Order of the Court of Hustings for the City of Portsmouth appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Page 18a. The Opinion of the Supreme Court of Virginia appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Appendix Page 1a and is reported at 212 Va. 554, 186 S.E.2d 43 (1972).

JURISDICTION

The final Judgment and Order of the Court of Hustings for the City of Portsmouth was entered on December 30, 1970, pursuant to §18.1-236.3 of the Code of Virginia (1950). The Opinion of the Supreme Court of Virginia, affirming the Court of Hustings for the City of Portsmouth, was entered on January 17, 1972. The jurisdiction of this Court was invoked under Title 28, U.S. Code, §1257, (2,3); §1201(c). A Writ of Certiorari to the Supreme Court of Virginia was issued by the Supreme Court of the United States on June 26, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution of the United States of America appear in the Appendix to the Petition for Writ of Certiorari herein, at Pages 23a and 24a. Section 18.1-236.3 of the Code of Virginia, appears in the Appendix to the Petition for Writ of Certiorari herein, at Pages 19a through 22a.

QUESTIONS PRESENTED

I. Is §18.1-236.3 of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging obscenity rather than a national community standard, and by providing for establishing a fact, through civil proceedings, for use in a criminal prosecution, all in violation of the First, Fifth, Sixth,

Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

II. Are the approximately 338 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense without sale or exhibition to juveniles, obtrusive advertising or pandering?

III. Whether the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected?

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth's Attorney for the City of Portsmouth, presented a Petition to the Court of Hustings for the City of Portsmouth, asking that certain books named in the Petition be adjudged obscene as provided by § 18.1-236.4 of the Annotated Code of Virginia. The Court of Hustings for the City of Portsmouth issued a Subpoena Duces Tecum to the Petitioners, Howard Alexander and Frank Collier, both employees of the "adult" bookstore in the City of Portsmouth, Virginia, operated by the Petitioner, Village Books, Inc. The Subpoena commanded their appearance on May 22, 1970, in the Court of Hustings for the City of Portsmouth and to produce approximately 400 different books and magazines, which constituted 99% of the literature offered for sale at the Petitioner's adult bookstore in the City of Portsmouth. A Motion to Quash the Subpoena Duces Tecum, was overruled and the books were taken by the Commonwealth Attorney.

On June 3, 1970, the Court of Hustings for the City of Portsmouth issued a Rule to Show Cause, why approximately 338 of the books should not be adjudicated

obscene pursuant to the Petition for an Order to Declare the Books Obscene; the Order to Show Cause was returnable July 17, 1970.

The Commonwealth Attorney for the City of Portsmouth on June 3, 1970, filed a Petition for an Order Temporarily Restraining the Sale or Distribution of Certain Books, being the books named in the Show Cause Order of the same date of the Court of Hustings for the City of Portsmouth. The Commonwealth Attorney gave notice to the Petitioners that the Court of Hustings would act upon the Petition for a Temporary Restraining Order on June 12, 1970. On the latter date, the Petitioners appeared through counsel, to request a Stay of the Court's actions upon the Petition for a Temporary Restraining Order, upon the ground that an adversary hearing had not been afforded to the Petitioners upon the issue of obscenity of the books and magazines, and the adversary hearing being set for July 17, 1970, by the Show Cause Order. The Court of Hustings for the City of Portsmouth denied the Petitioners' Motion for a Stay, but continued the hearing on the Petition for an Order Temporarily Restraining the Sale or Distribution of the questioned books and magazines.

The Petitioners filed an Answer to the Petition for an Order Adjudicating the books to be obscene and a Motion to Dismiss the Petition, which Motion was heard by the Court of Hustings on August 19, 1970. The Petitioners requested a trial by jury, which Motion was denied (A. 14), as was the Petitioners' Motion to Dismiss, and the case was tried by the Court of Hustings for the City of Portsmouth, without a jury, on November 4th and 5th, 1970.

At the trial, it was stipulated that the Petitioners' "adult" bookstore did not sell or distribute any literature

to juveniles, (A. 20). The Court of Hustings for the City of Portsmouth, at the outset, directed the return of the books which it had previously determined there was no probable cause to be believed obscene and the case proceeded upon the remaining approximately 338 books and magazines. The City of Portsmouth introduced as a witness an insurance salesman, Mr. Robert L. Holly, in an effort to establish the community standards of acceptance of comparable erotic literature for Portsmouth, Virginia. Mr. Holly had been a resident of the City of Portsmouth for fifteen years, (A. 21), and five to seven years earlier he had served as Chairman of an area-wide Chamber of Commerce Committee. The purpose of the Committee was to investigate obscene materials in the Tidewater area, (A. 25). The Committee purchased magazines at different locations throughout the community and discussed the magazines with diverse civic groups and organizations to determine what the community standard was for the Tidewater area at that time, (A. 23). Approximately one and one-half (1 ½) years prior to the trial, the witness did an extensive investigation into obscenity in the Portsmouth area, conducting a survey which took samples of the Portsmouth population of approximately 30,000 people, (A. 23-24). The witness met with various clubs and organizations in the area, displayed magazines and films depicting sex; among these clubs were the Navy Wives' Club, which included females from various parts of the United States, (A. 25). Mr. Holly was permitted by the Court of Hustings to testify as an expert on community standards, (A. 34-35), and stated his opinion that generally the books and magazines at issue exceeded the community standards of erotic materials, (A. 39). Mr. Holly was of the opinion that the local community standard was essentially the same as the

national standard. His opinion concerning the national standard was based upon his travel on the East Coast and in talking with people from throughout the country, (A. 26, 29-30). Mr. Holly had not been in an "adult" bookstore in recent years and although he was not established as an expert in any other field, Mr. Holly was permitted to testify regarding his opinion of the prurient appeal and social value of the questioned books and magazines, (A. 40). He was of the opinion that the majority of the books and magazines were patently offensive, did not meet community standards, and taken as a whole appealed to prurient interests in sex and did not have any redeeming social value. He did not differentiate which books or magazines he was referring to as having redeeming social value, however, he was of the opinion that none of the books and magazines could be considered, "hard core pornography", (A. 43). The witness considered the portrayal of sexual organs in photographs simulating sexual activities as exceeding the community standards, (A. 42, 44-45).

The Commonwealth next offered the testimony of Dr. Donald Lee Mingione, a psychiatrist, who was of the opinion that the majority, if not all of the books, appealed to the prurient interest, (A. 48-49). He further testified that none of the books possessed any redeeming social vlaue, (A. 51). He considered a prurient interest appeal to be an appeal to sexual arousement, (A. 48, 51).

The Commonwealth then introduced as a witness Mr. Richard Messenger, the proprietor of a printing establishment, who does printing for the Government and for firms outside the State of Virginia. Mr. Messenger testified that he relied upon bulletins from the National Association of Printers to ascertain what he should be

permitted to print, (A. 54, 60). The witness also was a Captain of the Auxiliary Police Force of the City of Portsmouth, (A. 54), and he was of the opinion that the various books and magazines would appeal to the prurient interest, which he considered mere sexual arousal, (A. 55). Mr. Messenger was of the opinion that several of the books and magazines were obscene, (A. 56). He testified that there was social value for art students in several of the magazines, (A. 57), and that more than one-half of the books and magazines involved would not be obscene, (A. 57). His determination of the prurient appeal of the magazines was determined upon the effect of the books and magazines upon "young persons" under nineteen years of age, (A. 59-60), not adults.

Following the denial of the Petitioners' Motion to Strike, (A. 64-65), the Petitioners offered the testimony of Dr. Wilbur Hammon, a United States Government psychiatrist, employed at St. Elizabeth's Hospital in Washington, D.C., and engaged in the private practice of medicine specializing in psychiatry, in the State of Virginia, (A. 65-66). Dr. Hammon was of the opinion that the books and magazines involved would not appeal to the prurient interest of the average viewer, (A. 68), although they only had a limited social value, (A. 70-71), and that the magazines did not constitute hard core pornography, (A. 73).

Thereafter, the Petitioners presented the testimony of Dr. Donald Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital in Cambridge, Maryland, (A. 82), who was of the opinion that the books and magazines would not appeal to the prurient interest of the average viewer, (A. 83), and that they did not exceed national community standards of tolerance in

the acceptance of erotic materials and that they had redeeming social value, (A. 83-84). Dr. Nachand agreed with the prior witnesses that the books and magazines could not be considered "hard core pornography", (A.84).

The Petitioners attempted to present to the Court of Hustings the Presidential Commission Report on Pornography, (A. 88), which the Court would not consider.

The Petitioners also offered the testimony of Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, who was of the opinion that the challenged books and magazines would not appeal to the prurient interest of the average person in the community, (A. 95), and that the literature did contain socially redeeming material, (A. 96-97), and that the magazines which contained photographs of simulated sexual activities would not necessarily appeal to the prurient interest of the average person, (A. 103).

At the conclusion of the testimony, the Petitioners again moved the Court to enter judgment in their favor, which Motion was denied.

On November 20, 1970, the Court issued a Memorandum declaring all of the books and magazines to be obscene and on December 30, 1970, the Court of Hustings for the City of Portsmouth, entered an Order adjudicating all of the books and magazines to be obscene and enjoining the sale of all the approximately 338 books and magazines.

The Petitioners appealed to the Supreme Court of Virginia, which Court on January 17, 1972, affirmed the action of the Court of Hustings for the City of Portsmouth, which Opinion is reported at 212 Va. 554, 186 S.E.2d 43, and is printed in the Appendix attached to the Petition for Writ of Certiorari herein, at Appendix Page 1a.

ARGUMENT

I.

Is § 18.1-236.3 of the Annotated Code of Virginia Repugnant to the Constitution of the United States of America by Prohibiting a Jury Trial to Determine Obscenity and by Permitting a Prior Restraint on Literary Material, and by Providing for a City-wide Community Standard for Judging Obscenity Rather Than a National Community Standard, and by Providing for Establishing a Fact, Through Civil Proceedings, for Use in a Criminal Prosecution, All in Violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

Section 18.1-236.3 of the Code of Virginia is repugnant to the Constitution of the United States of America as follows,

FIRST, DENIAL OF TRIAL BY JURY:

Subsection 8 of the Virginia Code provides in pertinent part "If an appearance is entered and an answer filed, the Court shall order the proceedings set on the calendar for a prompt hearing. The Court shall conduct hearing in accordance with the rules of civil procedure applicable to the trial of cases by the Court without a jury". In the Court of Hustings for the City of Portsmouth, Petitioners demanded a trial by jury, (A. 14), which motion was denied by the Court. This Court in *Roth v. U.S.*, 354 U.S. 476, at 492 n. 30, determined that a jury trial is constitutionally mandated to determine the issue of obscenity under the First Amendment to the Constitution of the United States of America in a criminal prosecution. This Court did not reach the issue of whether a jury trial is mandated by the First Amendment

in a civil obscenity proceeding, in its determination of the constitutionality of the New York State Statute in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, decided the same day as *Roth v. U.S.*, supra. This argument was developed in the dissenting opinion of Mr. Justice Brennan at Page 448,

> "In *Alberts v. California*, and *Roth v. United States*, decided today 1 L. Ed. 2d 1498, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The statutes there involved allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity.
>
> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

Petitioners argue that only a jury, under proper instruction from the Court, can render a proper judgment in an obscenity determination. Petitioners have been involved in numerous cases and have learned from bitter experience that Judges, too often overly sensitive to public opinion and concerned with re-election, maintain too keen a view of the majority stand without proper consideration for the minority viewpoint historically protected by the First Amendment. In the case of *Village Books v. Arthur Marshall*, 263 Md. 76, 282 A.2d 126, Petition for Writ of Certiorari pending, Case No. 71-739, this unfortunate fact was clearly illustrated when the book "Auto Fellatio and Masturbation" was condemned by a judge in an equity proceeding. This same book having been acquitted whenever it was presented to a jury for consideration. Petitioners argue that a single judge may, because of religious sentiments, also have personal prejudice against pictorial representation of nudity which overcomes his ability to fairly decide the vital First Amendment issues. Prospective jurors with such preconceived opinions may be ferreted out on Voire Dire examination and eliminated from the petty jury. It is too great a burden to place upon a single judge, in a small city such as Portsmouth, Virginia, to adjudicate as not obscene, books and magazines which are unpopular with the majority of the members of his church and community, who may be called upon to decide the issue of his re-election. Thereupon, Petitioners argue that the First Amendment to the Constitution of the United States of America which historically has protected the minority viewpoint, as made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, *Mapp v. Ohio*, 367 U.S. 643, mandates a trial by jury on the issue of obscenity in a civil proceeding as well as in a criminal proceeding.

SECOND, PRIOR RESTRAINT OF LITERARY MATERIAL:

Petitioners argue that Subsection 5 of the Code of Virginia, permits a prior restraint of literary material by authorizing a temporary restraining order prohibiting the dissemination of alleged obscene books and magazines without providing for any adversary hearing on the issue of obscenity prior to the restraint. The Code of Virginia does not provide any time limit for the extent of the prior restraint other than the direction, as provided in Subsection 8 of the Code of Virginia, that in the event an appearance is entered and an Answer filed, the Court shall order the proceeding upon the Order to Show Cause set on the calendar for a prompt hearing. There are none of the safeguards which this Court approved in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, at 438,

> "... Appellants consented to the granting of an injunction pendente lite and did not bring the matter to issue promptly, as was their right under subdivision 2 of the challenged section, which provides that the persons sought to be enjoined 'shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial' ".

There is no provision in the Virginia Code for the prompt final judicial determination which this Court found to be constitutionally required in *Teitel Film v. Chicago,* 390 U.S. 139, at 141,

> "In *Freedman v. Maryland,* 380 U.S. 51, 58-59, 13 L. ed 2d 649, 654, 655, 85 S. Ct. 734, we held '... that a noncriminal process which required the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the

dangers of a censorship system. . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period*, either issue a license or go to court to restrain showing the film. . . [T]he procedure must also assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.' (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure 'that the censor will, within a specified brief period, either *issue a license or go to court to restrain showing the film'. (2) The absence of any provision for a prompt judicial decision by the trial court violates the standard '. . . the procedure must also assure a prompt final judicial decision. . .' ".

As the statute was applied in this case, the Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books was filed June 3, 1970, and notice of hearing was given for June 12, 1970, (Appendix to Petition for Writ of Certiorari herein, Pages 4a through 6a). If the Petitioners had not filed a Declaratory Judgment and Injunction action in the United States District Court for the Eastern District of Virginia, Norfolk Division, it is safe to say that the Temporary Restraining Order would have been passed by the Court of Hustings for the City of Portsmouth no later than June 13, 1970 and the restraint would have remained to the present. The Court of Hustings heard testimony on November 4, and November 5, 1970; it did not decide the issues of obscenity until November 20, 1970, five months after the date when the Temporary Restraining Order would have been entered.

This provision allowing the unconstitutional prior restraint was upheld by the Supreme Court of Virginia, which avoided the issue by stating, "But, no temporary restraining order was issued in this case. Even so, all prior restraint is not necessarily prohibited". Petitioners argue that the authorities cited by the Court below are not controlling. This case is not one, like *United States v. 37 Photographs*, 402 U.S. 363, in which the Customs Department of necessity are required to inspect large quantities of materials, and engage in time consuming activities required in assessing duties on imports. The books in the Court below had been perused by the Court of Hustings prior to the issuing of the Order to Show Cause and the filing of the Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books, on June 3, 1970, and thereupon, Petitioners argue that this Court should not allow to stand such a statute which is so patently offensive to the right of free speech and an unfettered press protected by the First Amendment to the Constitution of the United States of America.

THIRD, LOCAL COMMUNITY STANDARDS:

This Court in *Roth v. United States*, 354 U.S. 476, espoused the definition of obscenity as follows, at 489,

> "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The issue of what area is to be considered the "community" has perplexed many courts. Petitioners argue that Subsection 8(b) of the Code of Virginia is repugnant to the First and Fifth Amendments to the Constitution of the United States of America, made

applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, by establishing an improper local city-wide community area for measuring the degree of tolerance of erotic material, rather than considering the statewide or national contemporary community standard of acceptance of erotic literature. The Supreme Court of Virginia, noting that this Court had the issue under consideration in *Miller v. California*, 401 U.S. 992, stated, "We are of the opinion that a community standard is the proper standard. In light of the diversity of opinion that exists in our nation, it would be impossible to establish a workable national standard. See Chief Justice Warren's dissenting opinion in *Jacobellis v. Ohio*, 378 U.S. 184, (1964)."

In no other reported decision that Petitioners have been able to locate has the community been established as a single city as opposed to a statewide or national community standard. See *Hudson v. U.S.*, 234 A.2d 903; *In Re Gianinni*, 69 Cal. 2d 563, 446 P.2d 535; *Duggan v. Guild Theater, Inc.*, 436 Pa. 191, 258 A.2d 858; *Dunn v. State Board of Censors*, 240 Md. 249, 213 A.2d 751; *Ramirez v. State*, 430 P.2d 826; *City of Phoenix v. Fine*, 4 Ariz. App. 303, 420 P.2d 26; all following the lead of Justice Frankfurter, concurring in *Smith v. California*, 361 U.S. 147,

> "... Community standards or the psychological or physiological consequences of questioned literature can, as a matter of fact, hardly be established except through experts ... there is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of any individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining

what constitutes obscenity, Roth v. United States, 354 U.S. 476, it surely must be deemed rational, and therefore, relevant to the issue of obscenity, to allow light to be shed on what those contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit or miss, subjective view of what they are believed to be by the individual juror or judge."

The application of a local standard rather than a national standard of tolerance of erotic literature was error. Local guidelines are not appropriate, for if each of the fifty (50) states, the District of Columbia, Puerto Rico and the Virgin Islands were free to apply their own contemporary community standards for what they might proscribe as obscene, "... The constitutional limits of free expression in the nation would vary with state lines." *Pennekamp v. Florida,* 328 U.S. 331, at 335. Under this standard a book acceptable in Richmond could be condemned in Portsmouth less than seventy-five (75) miles removed. It was to avoid that kind of unthinkable result that Justice Brennan, announcing the judgment of this Court in *Jacobellis v. Ohio,* 378 U.S. 184, said, "The constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding,". Id. at page 195; see also the concurring opinion of Justice Harlan in *Manual Enterprises v. Day,* 370 U.S. 478, at 488.

The view has been taken that the question of obscenity must be determined on the basis of a national standard in *Excellent Publications, Inc. v. United States,* 309 F.2d 362, where the Court stated that the "Community" in terms of whose standards of decency on the issue of obscenity must be decided, is not any local community

but the national community as a whole. The view that the contemporary community standard must necessarily be uniform throughout the nation, and that a standard for one state standing alone is not sufficient, was taken in *State v. Hudson County News Company*, 41 N.J. 247, 196 A.2d 225, where the Court stated:

> "The First Amendment accepts for the Nation as a whole the basic idea that freedom of expression is a necessary guarantee in a democratic society. In determining the constitutional limits of obscenity regulation, the issue in the particular case is whether the published material falls within or without that area of expression which is the purpose of the First Amendment to protect. In resolving this issue, the Court or jury must recognize that the balancing of freedom of expression against other social values has already been made in the adoption of the First Amendment and that this basic determination cannot be re-evaluated by a de novo balancing of local social interest against that area of constitutional protection which has been established."

The First Amendment protects the entire nation, therefore, the standards to be applied under the First Amendment cannot operate in such a way as to alter the degree of protection from locality to locality. The area of expression entitled to constitutional protection cannot be broad in some parts of the country and narrow in others. If a publication comes within the protected area it cannot be suppressed any place where the First Amendment guarantee is in effect. See also *Haldeman v. United States*, 340 F.2d 59, in reversing a conviction for mailing obscene matters, the Court, in footnote 5, stated that the community standard to be applied is that of the nation as a whole and not that of a particular locality or area. To

limit the boundaries of the conception of the standard of community tolerance to an area less than the entire nation would conflict with the First Amendment, *State v. Locks*, 97 Ariz. 148, 397 P.2d 949. In *State v. Vollmer*, 389 S.W.2d 20, the State of Missouri determined that the term "community" as used in determining the standard of decency does not mean the local area involved, but relates to a national standard. See also *Flying Eagle Publication, Inc. v. United States*, 273 F.2d 799, wherein it was stated that in considering a national statute the Court should recognize that juries differ rather widely over the country at large and to give the statute some uniformity in its application and to prevent an abridgement of the freedom of the press the Court should very carefully scrutinize the material alleged to be obscene before submitting it to a jury. A statewide standard of obscenity was adopted in *McCaulley v. Tropic of Cancer*, 20 Wis.2d 134, 121 N.W.2d 545; (A Declaratory Judgment Proceeding involving the book, Tropic of Cancer), the Court pointed out that the purpose of the Wisconsin Statute left no distinction to be made between the standards of different communities within the State.

Thereupon, Petitioners argue that the Code of Virginia is unconstitutional in drawing too narrow an area for consideration of "Community" standards.

FOURTH, VAGUENESS:

Petitioners argue that Section 18.1-236.3 is unconstitutionally vague in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America in that Virginia Code provides for a quasi-criminal proceeding for the purpose of civilly establishing a proven fact (Knowledge

of obscenity or scienter) for use in a criminal prosecution, without affording the defendant-respondent his constitutional right to a trial by jury on all issues of fact in a criminal case. Subsection 13 of Section 18.1-236.3 of the Code of Virginia provides that the proceedings, "shall be intended only to establish scienter in cases where the establishment of said scienter is thought to be usable or desirable by the Petitioner", (The Commonwealth Attorney). At any subsequent criminal trial the introduction of a finding of the Court of Hustings for the City of Portsmouth relating to knowledge of obscenity or scienter, would clearly be unconstitutional and deny the party defendant therein, of his right to confront the witnesses against him and of his right to a jury determination of each and every issue of fact.

Section 18.1-236.3 of the Code of Virginia is unconstitutionally vague in that it provides for a temporary restraining order, but it does not provide for the issuing of a permanent injunction, restraining the sale of alleged obscene books and magazines. The Court of Hustings for the City of Portsmouth entered such a permanent injunction order herein, which Petitioners argue was an unconstitutional infringement upon their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. This void in the grant of authority to the Court of Hustings for the City of Portsmouth is apparent when Subjection 13 of the Virginia Code is considered in relation to Subsection 11, which refers only to "temporary restraining order", and the Virginia Code is devoid of any authority to permanently enjoin the dissemination of literary materials. This unconstitutional usurping of authority by the Court of Hustings for the City of Portsmouth, and the denial of the Petitioners' rights protected by the Constitution of the United States of America, should not be countenanced by this Court.

II.

Are the Approximately 338 Books and Magazines, Enjoined from Sale by the Court Below, Obscene in the Constitutional Sense Without Sale or Exhibition to Juveniles, Obtrusive Advertising or Pandering?

Petitioners argue that all of the approximately 338 books and magazines are protected by the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and that the decision of the Court of Hustings for the City of Portsmouth was contrary to the law and the evidence. All of the witnesses who supplied evidence in the Court of Hustings for the City of Portsmouth agreed that the approximately 338 books and magazines at issue did not constitute "hard core pornography," (A. 43, 57, 73, 84, 96-97). Since 1957, when this Court decided *Roth v. U.S.*, 354 U.S. 476, it has been recognized that sex and obscenity are not synonymous and constitutional protection has been afforded all literary materials not utterly without redeeming social value, *Memoirs v. Massachusetts*, 383 U.S. 413. In the case of *Redrup v. New York*, 386 U.S. 767, this Court, per curiam, in reaffirming the definition of obscenity in *Roth v. United States*, supra, as amended by this Court's subsequent decisions, considered three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the erotic material; (3) Pandering of the material as described in *Ginzburg v. U.S.*, 383 U.S. 463. In the Court of Hustings for the City of Portsmouth, it was stipulated that the literary materials

at issue were not sold or distributed to juveniles, (A. 20). There was no testimony afforded, and there could not have been any testimony, regarding alleged pandering or obtrusive advertising. Petitioners argue that it is irrefutable that the approximately 338 books and magazines involved herein are, therefore, within the scope of the protection of the First Amendment to the Constitution of the United States of America. This Court has on numerous occasions re-emphasized this interpretation of the law of obscenity in per curiam decisions granting certiorari and reversing lower Courts citing only *Redrup v. New York*, supra. Of these recent decisions we should compare *Carlos v. New York*, 396 U.S. 119, reversing 24 N.Y.2d 86, 301 N.Y.S.2d 96, wherein the New York Court of Appeals had held the questioned material to be "hard core pornography." In the Court of Hustings for the City of Portsmouth, all of the testimony, the Commonwealth's evidence and the testimony elicited by the Defense, was that the approximately 338 books and magazines did not constitute hard core pornography, and did not vividly depict scenes of fellatio, cunnilingus, or coitus. Some of the books and magazines contained photographs depicting *simulated* erotic activities that suggest, but leave to the imagination, the consummation of the sexual activities. The photographic technique is superior and the books and magazines are protected by the First Amendment to the Constitution of the United States of America. Both the Court of Hustings for the City of Portsmouth and the Supreme Court of Appeals of Virginia, refused to consider this Court's decision in *Bloss v. Dykema*, 398 U.S. 273, reversing 17 Mich. App. 318, 169 N.W.2d 367, by condemning as obscene the magazines "Cover Girl" and "Exciting" which were the subject of the latter decision wherein this Court was again forced to apply the protection of the First Amendment to challenged literary material.

The Supreme Court of Virginia refused to make an independent judgment of obscenity or to consider this Court's action in *Burgin v. South Carolina*, No. 70-122, ___ U.S. ___, 30 L.Ed. 2d 39, reversing the Supreme Court for the State of South Carolina, 178 S.E.2d 325, in which opinion the South Carolina Court described the magazines, "Mirage," "Togetherness," "Fair Lady No. 1" and "Flesh Fantasy, Vol. II, No. 1", as follows:

> "... We have studied the material to make a de nova determination of obscenity vel non. We find that each of the four magazines is comprised almost totally of photographs which display nude young women in poses that center the attention of the viewer upon the vulva and surrounding area. They obtrusively expose the female genitalia in an obvious design to appeal to a prurient interest in sex. They serve no additional purpose except to produce revenue for the sellers. These magazines are a degrading, disgusting exploitation containing no pretense of artistic value. They cannot be permitted in a society which hopes to retain any semblance of constitutional and moral stability. The dissemination of this smut, which is utterly without redeeming social value, cannot be placed beyond the reach of the law. The argument that adults should be free to see and read what they want must be weighed in light of reality. Each time the First Amendment is stretched to include license to sell materials of the type involved in this action, a new flood of publications come into being. The benefits to society from freedom of speech and of press can best be protected by curbing license. Applying contemporary community standards, we find beyond a reasonable doubt the dominant theme of the magazines taken as a whole appeals to the prurient interests and are patently offensive and obscene in the constitutional sense. They are utterly without redeeming social value."

This Court had comparable books and magazines for consideration which depicted *simulated* sexual activities, in Case No. 71-443, *Wiener and Dulin v. California*,—— U.S.——, 30 L.Ed. 2d 539, in both of these cases, this Court on December 14, 1971, one month and three days prior to the action of the Supreme Court of Virginia herein, granted certiorari and reversed the judgment of the lower Courts, citing *Redrup v. New York*, supra. Petitioners argue that the First Amendment to the Constitution of the United States of America must be given effect in all fifty of our United States to protect the rights of the Petitioners to sell books and magazines which are not "hard core pornography", as well as the rights of the public, in all of our fifty states, to purchase and read literary material which is not obscene as defined by this Court and thereupon, the judgment of the Court below should be reversed.

III.

Whether the Display of Any Sexually Oriented Pictorial Magazines for Commercial Sale, When Surrounded by Notice to the Public of Their Nature and by Reasonable Protection Against Exposure of the Magazines to Juveniles, is Constitutionally Protected?

Petitioners assert the position that the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected. Petitioners differentiate "hard core pornography" as defined by the Solicitor General of the United States, which definition was adopted by Mr. Justice Stewart in his dissenting opinion in *Ginzburg v. U.S.*, 383 U.S. 463 at 499,

"In order to prevent any possible misunderstanding, I have set in the margin a description, borrowed from the Solicitor General's Brief, of the kind of thing to which I have reference."

"... Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and some times involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format closely depicting similar activities in an exaggerated fashion...".

Petitioners distinguish the above defined "hard core pornography" from sexually oriented pictorial magazines, such as those involved in this case, which depict only "simulated" sexual activities. The magazines herein, in the main, consist of good to excellent professional photography of nude young adults, together with varying amounts of textual material. There are females alone, there are male and female couples; there are trios—two females and one male or two males and one female; there are quartets—two females and two males. They contain an indiscriminate mixture of races, negroes, male and female, and whites, male and female. The models have been photographed naked in a large variety of poses, postures, positions and arrangements. Their facial expressions range from utterly blank to apparently lively and rapturous. The genital areas are often conspicuously displayed in explicit and chromatic detail. Some photographs suggest that sexual activity is but inches and seconds away but the vivid depiction of actual fellatio, cunnilingus, pederasty, copulation, masturbation, coitus and any other subsiduary variation of those activities has been studiously avoided.

This Court in *Roth v. U.S.*, 354 U.S. 476, held that "hard core pornography" was not protected by the First Amendment to the Constitution of the United States of America. This decision was reaffirmed by this Court in *U.S. v. Reidel*, 402 U.S. 351, which silenced further argument upon that issue. However, the per curiam opinion of this Court in *Redrup v. New York*, 386 U.S. 767, prior to voicing the divergent opinions of the members of the Court, stated at 769,

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Massachusetts*, 321 U.S. 158; cf. *Butler v. Michigan*, 352, U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollack*, 343 U.S. 451. And in none is there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. U.S.*, 383 U.S. 463."

This Court laid to rest the issue of exposure of the sexually oriented pictorial magazines to juveniles in the case of *Ginsberg v. New York*, 390 U.S. 629, and it was stipulated in the trial below that the Petitioners' adult bookstore did no business with juveniles, (A. 20). There was no issue in the Court below, and there could be none, of obtrusive advertising, which concerned Justice Harlan in his separate opinion in *Roth v. U.S.*, supra, at Page 502,

> "And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity."

It was to comply with this aspect of the law that adult bookstores block the public's view from the sidewalks into the bookstore so that it is impossible for a person who does not desire to view a nude photograph to pass the window of an adult bookstore and see any of the merchandise therein displayed for sale. This Court held in *Stanley v. Georgia*, 394 U.S. 557, that the individual has the right to enjoy any type of literature in the privacy of his own home. It is a physical impossibility for a citizen to produce his own erotic literature. In the Report of the Commission on Obscenity and Pornography, the Commission found as the content of "Adults Only" magazines, comparable to those involved in this case, "The posing of more than one model in a single photograph has resulted in the considerable amount of implied sexual activity, either intercourse or oral-genital contact, but neither actual sexual activity nor physical arousement of males is depicted at the present time." (Report of Commission on Obscenity and Pornography, September, 1970, Page 16). The Commission Report continues to state, "Combining all sources of information, the Commission estimates that twenty-five to thirty million "Adults Only" paperback books were sold in 1969 for a total retail value of $45 to $55 million; "Adults Only" magazines sales were approximately $25 to $35 million for 14 to 18 million copies. The best estimate is that "Adults Only" materials in the U.S. accounted for between $70 to $90 million in retail sales in 1969." (Report of the Commission on Obscenity and Pornography at Page 17). In describing the patrons of adult bookstores the Report of the Commission on Obscenity and Pornography stated at Page 21,

> "Patrons of adult bookstores and adult movie theaters may be characterized as predominantly white, middle-class, middle-aged, married males.

dressed in business suit or neat attire, shopping or attending the movie alone. Almost no one under 21 was observed in these places, even where it was legal for them to enter.

The average patron of adult bookstores and movie houses appears to have had fewer sexually related experiences in adolescence than the average male in our society, but to be more sexually oriented as an adult. The buyers of erotica report frequencies of intercourse fairly similar to those of nonconsumers, and report a similar degree of enjoyment of intercourse. Their high degree of sexual orientation in adulthood encompasses, in addition to pictorial and textual erotica, a variety of sexual partners and of sexual activities within a consensual framework. Activities most frowned upon by our society, such as sadomasochism, pedophilia, bestiality, and non-consensual sex, are also outside the scope of the interests of the average patron of adult bookstores and movie houses."

An analysis of the foregoing information leads to the conclusion that a substantial minority of the adult public of the United States desires the right to purchase sexually oriented pictorial magazines, which this Court should differentiate from hard core pornography, and which this Court should declare to be constitutionally protected.

While the Report of the Commission on Obscenity and Pornography recommends the repeal of all legislative regulation upon the sale of sexual materials to adults, Petitioners do not extend that far in this argument. Petitioners ask this Court to draw the line at hard core pornography as hereinabove defined and thereby balance the interests of the divergent groups. This would balance the right of Government to regulate the dissemination of sexually explicit materials against the rights of those

Americans who deeply value the right of each individual to determine for himself what books and magazines he wishes to read and what pictures he wishes to view. The tradition of free speech and press also value and protect the right of writers, publishers, and book sellers to serve the diverse interests of the public. We should not seek to interfere with these rights unless a clear threat of harm makes that cause imperative, since any censorship constitutes a threat to the free communication of ideas among Americans, the foundation stone of our liberties. And thereupon, Petitioners argue that the display for commercial sale of sexually oriented pictorial magazines, which are not hard core pornography, when there is no obtrusive advertising or sales or exposure of the materials to juveniles, should be constitutionally protected.

CONCLUSION

In summary, the approximately 338 books and magazines condemned by the Courts below, do not constitute hard core pornography, although several depict *simulated* erotic activities, without vividly depicting sexual action or congress and all of said books and magazines should be protected by the First Amendment to the Constitution of the United States of America, as made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America. In addition thereto, this Court should strike down the Virginia Code provision as being repugnant to the Constitution of the United States of America in prohibiting a trial by jury thereby allowing a Judge, who is not insulated from transient community passions and prejudices, to decide the issue of obscenity on the basis of his own sensibilities based upon what he

considers "dirty" or "offensive", or upon his own indignation and disgust or upon possible extra-judicial pressure. The Virginia Code provision is also repugnant to the Constitution of the United States of America in permitting a prior restraint of literary material and in limiting the area for consideration of community standards of tolerance of erotic materials and in being vague and indefinite. Finally, Petitioners conclude that the display of sexually oriented pictorial magazines for commercial sale, when they do not constitute hard core pornography, and when there is due regard to protect the adult public from obtrusive invasions of privacy and where there is due regard to protect against exposure to juveniles, to be constitutionally protected.

Therefore, Petitioners respectfully urge this Court to reverse the judgment of the Supreme Court of Virginia and the Court of Hustings for the City of Portsmouth.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1971

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS, INC., MEDIA ARTS, AND GUILD PRESS, LTD.,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Is § 18.1-236.3, of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging obscenity rather than a national community standard, and by providing for establishing a fact, through civil proceedings, for use in criminal prosecution, all in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

2. Are the approximately 300 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense, without sale or exhibition to juveniles, obstrusive advertisnig or pandering?

3. Whether the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected?

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth's Attorney of the City of Portsmouth presented a petition to the Hustings Court asking that certain books named in the petition be adjudged obscene as set forth in § 18.1-236.3 of the Code of Virginia. The Hustings Court issued a writ of subpoena duces tecum returnable on May 22, 1970, at which time the petitioners produced copies of the named books. A motion to quash the subpoena duces tecum was overruled and the books were left in the custody of the Court. On June 3, 1970, the Hustings Court issued a rule to show cause why the books should not be adjudicated obscene. On June 12, 1970, the petitioners appeared through counsel and moved for a stay of the proceedings which was denied. The petitioners filed an answer to the petition and a motion to dismiss the petition, which was heard by the Court on August 19, 1970. Following the denial of the petitioners' motion to dismiss, the case was tried by the Court on November 4 and 5, 1970.

At the commencement of the trial on November 4, 1970, it was stipulated that the petitioners' book store did not sell or distribute any literature to juveniles (A. 20). In addition, the Court directed the return of those books which it had

previously determined that there was no probable cause to believe they were obscene. The first witness to testify on behalf of the Commonwealth was Robert Holley, a resident of the City of Portsmouth for fifteen years (A. 21). Mr. Holley testified that five to seven years before he had served as chairman of an area wide Chamber of Commerce committee composed of representatives of Norfolk, Virginia Beach, Portsmouth, Newport News, Suffolk, and Nansemond County, the purpose of the committee being to investigate obscene matters in the area (A. 23, 24). The committee purchased magazines from different locations throughout the community and by discussing the magazines with civic groups and organizations, the committee was able to determine what the community standard was throughout the whole area (A. 23). About a year and a half prior to trial, Mr. Holley did extensive investigation into obscenity in the Portsmouth area and by sampling contacted the equivalent of 30,000 people in the Portsmouth area (A. 23, 24). During this time Mr. Holley met with various clubs and organizations in the area and displayed magazines and films depicting sexual portrayals of all types. These clubs included the Navy wives' clubs, which included persons from various parts of the country (A. 26). During this investigation, Mr. Holley was not only able to determine what the community standard was, but also formed the opinion that the local standard was essentially the same as the national standard. His opinion concerning the national standard was based upon his travels on the East Coast and in talking with people from throughout the country (A. 30). Upon this background, Mr. Holley was considered as an expert winess and allowed by the Court to testify (A. 30). Mr. Holley testified that he had examined each of the books in question (A. 35), and that in his opinion the majority of the books were patently

offensive and did not meet the community standard (A. 38, 39). Mr. Holley also testified that the books taken as a whole appealed to prurient interest in sex and the majority of the books did not have any redeeming social value (A. 40). Mr. Holley did state that he did not consider nudity alone as violating the community standard, but that nude persons in suggestive poses depicting sexual intercourse or sodomy did violate the community standard (A. 42, 45).

The Commonwealth, next offered the testimony of Dr. Donald Lee Mingione. Dr. Mingione specializes in the field of psychiatry and has been practicing in Portsmouth for nine years (A. 47). Dr. Mingione was qualified as an expert psychiatrist and was qualified to testify concerning social values (A. 49). Dr. Mingione testified that he had examined each of the books in question (A. 47) and in his opinion the majority, if not all of the books, appealed to the prurient interest (A. 49). He further testified that none of the books possessed any redeeming social value (A. 51).

The Commonwealth then introduced Richard Messenger who stated that he was the owner of Messenger Printing Company, had lived in Portsmouth for forty-three years and been in the printing business for twenty years (A. 53, 54). Mr. Messenger testified that he does printing for the Government and firms outside of the State of Virginia and also receives bulletins concerning what is to be printed and not to be printed in the obscenity field. Mr. Messenger also testified that he had attended meetings with other printers and publishers to discuss standards of printing obscene materials (A. 54). Mr. Messenger examined all of the books in question (A. 54) and in his opinion they would appeal to the prurient interest (A. 55).

The petitioners offered the testimony of Dr. Wilbur Hammond, a resident of Arlington, Virginia, who is engaged

in the private practice of medicine, specializing in psychiatry (A. 65). Dr. Hammond spent about ten minutes looking at from fifteen to twenty of the books (A. 71, 72) and gave his opinion that the books involved would not appeal to the prurient interest (A. 68). Dr. Hammond based his conclusion on the fact that he had shown similar magazines to his patients and fellow doctors at St. Elizabeth's Hospital (A. 68). Dr. Hammond further testified that there are only a few items that would be entirely without redeeming social value and that hard core pornography would have some redeeming social value (A. 73).

Thereafter the petitioners presented the testimony of Dr. Donald W. Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital, in Cambridge, Maryland (A. 82), who was of the opinion that the books would not appeal to the prurient interest of the average individual (A. 83). Dr. Nachand testified that he had examined only approximately one-half of the books in question (A. 85). He further testified that he did not believe these books exceeded the community standards and that they probably had some socially redeeming value (A. 83). Dr. Nachand further testified that hard core pornography is not necessarily obscene (A. 91).

Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, testified that the books may appeal to the prurient interest of a group of people (A. 97). He further testified that he would not feel qualified to say what standards are relative to prurient interests for most people in that it differs from person to person and is an individual concept (A. 99, 100). Dr. Kastner in answer to a question propounded by the Court, stated that the magazines might be considered obscene by a majority of the citizens (A. 103).

ARGUMENT

I.

Section 18.1-236.3 Of The Code Of Virginia Is Constitutional.

Petitioners first assert that § 18.1-236.3 (set forth in petitioners' petition Appendix pgs. 19a-21a), is unconstitutional in that it does not provide for trial by jury. Subsection 8 of this section specifically provides that the hearing shall be conducted by the court in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury.

Section 18.1-236.3 is not a criminal proceeding, but rather is an in rem proceeding. The petition is directed against the book or books considered to be obscene, and this section provides no criminal penalties. This proceeding is a creature of statute and was unknown at common law. It has long been well settled that neither the State nor Federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these constitutions were adopted. *Bowman* v. *Va. State Entomologist*, 128 Va. 351 (1920); 50 C.J.S., Juries § 10.

As a general rule, jury trials may be properly denied in purely statutory actions or proceedings. 47 Am. Jur. 2d, Jury, § 41.

Although the Supreme Court was not called upon to decide the issue of a jury trial in *Kingsley Books* v. *Brown*, 354 U.S. 436 (1957), it nevertheless approved a New York statute which set forth the procedure to enjoin the distribution of obscene books without the benefit of a jury trial. See also *Village Books, Inc.* v. *State's Attorney, Prince George's County*, 282 A.2d 126 (Md. 1971).

Petitioners next urge that the statute is unconstitutional in that it provides for a prior restraint without the benefit of an adversary hearing. Subsection 5 provides that when

an order to show cause is issued the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

This Court in *Freedman* v. *Maryland*, 380 U.S. 51 reemphasized its previous holding that prior restraint is not necessarily unconstitutional under all circumstances.

In the recent case of *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), this Court had occasion to review its decision in *Freedman* as it applied to 19 USC § 1305 (a). In reviewing *Freedman*, this Court said it had struck down the state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58. This Court continued that to insure a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, this Court further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "(a)ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) ". . . the procedure must also assure a prompt final judicial decision." (Id. at 58-59).

Section 18.1-236.3 provides for just the type of judicial determination in an adversary proceeding envisioned in *Freedman*. In addition, this section provides that any prior restraint to preserve the status quo will be for a short fixed period. Subsection 5 provides that when a show cause order is issued and upon four days' notice the court may

issue a temporary restraining order. Subsection 4 (d) requires that the show cause order be returnable 21 days after service. Subsection 8 provides that if appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing.

Petitioners further contend that § 18.1-236.3 is unconstitutional in that it establishes an improper standard of measuring contemporary community standards. Petitioners argue that a national standard should apply whereas the code section provides for a local standard.

A cogent argument for community standards was made by then Chief Justice Warren and Justice Clark in a separate opinion in *Jacobellis* v. *State of Ohio*, 378 U.S. 184 (1964), when they said:

> "It is my belief that when the court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' and perhaps there should be none. At all events, this court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the court in confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." Id. at 200.

In the recent case of *Hoyt* v. *Minnesota*, 399 U.S. 524, 90 S.Ct. 2241 (1970), Mr. Justice Blackmum, with whom The Chief Justice and the late Mr. Justice Harlan joined opined that:

> "I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure—rather than one capable of some flexibility and resting on concepts of reasonableness—of what each of our several States constitutionally may do to regulate obscene products within its borders."

Numerous courts across the nation have recognized either a statewide or local community standard. *People* v. *Kaplan,* 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372 (1972); *Hunt* v. *State,* 475 S.W.2d 935 (Tex. Crim. App. 1972); *Davidson* v. *State,* 251 So.2d 841 (Fla. 1971); *McKinney* v. *State,* 254 So.2d 714 (Ala. 1971); *State* v. *Henry,* 198 So.2d 889 (La. 1967).

It would appear to be impossible and impractical to establish a national standard. The values and tastes of this nation's citizens vary from place to place, and a national standard would not allow any flexibility in recognizing these variances.

It would be highly improbable if not next to impossible to find an expert who could express an informed opinion upon the standards of citizens across the country. One can envision the mythical expert who would express knowledge about the free style of life, strip joints, etc., which abound in metropolitan areas such as New York, Chicago, and Los Angeles, but who would not have the faintest idea of the life style of citizens of Butte, Montana or Lexington, Virginia.

The Commonwealth submits that the constitution permits a state to adopt its own standard as long as it is consistent with due process; and in light of the diversity of opinion that exists in our nation, it would be impossible to establish a workable national standard.

Petitioners lastly argue that § 18.1-236.3 is unconstitutionally vague in that it provides for establishing scienter

for use in a criminal prosecution without affording the defendant his constitutional right to a trial by jury on all issues of fact in a criminal case, and further that while the section provides for a temporary restraining order it does not provide for a permanent injunction.

In the first instance § 18.1-236.3 is a proceeding to determine whether specified books are obscene and does not conclusively establish knowledge or scienter. The question of knowledge or scienter in a criminal prosecution would still be an issue to be resolved by a jury, and the proceedings under § 18.1-236.3 are merely intended as an aid in that determination where thought to be useful or desirable.

In the second place once books have been determined to be obscene they are not entitled to the protection of the Constitution, *Roth* v. *United States,* 354 U.S. 476 (1957), and it would appear logical that their distribution could be permanently enjoined.

For the reasons aforementioned, it is submitted that § 18.1-236.3 is constitutional.

II.

The Books And Magazines Are Obscene Without Sale Or Exhibition To Juveniles, Obstrusive Advertising Or Pandering.

The petitioners contend the judgment of the court below was contrary to the law and evidence, and rely mainly upon *Redrup* v. *New York,* 386 U.S. 767 in which they say that this Court reaffirmed the prior definition of obscenity in *Roth,* and added three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it; and (3) Pandering which was found in *Ginzburg.*

The Commonwealth submits that any such contention has been completely laid to rest, even if it ever had any validity.

In *United States* v. *Reidel*, 402 U.S. 351 (1971) the defendant was charged with a violation of 18 USC § 1461, which prohibits the knowing use of the mails for the delivery of obscene matter. Reidel had advertised in the newspaper that a person seeking his illustrated booklet must be over 21 years of age, and one of the booklets had been mailed to a postal inspector stipulated to be over 21. The District Court dismissed the indictment and concluded that § 1461 could not be constitutionally applied "where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults . . . ." This Court rejected the reasoning of the District Court and reversed the judgment.

This Court held that *Roth* squarely placed obscenity and its distribution outside the reach of the First Amendment and refused to overrule *Roth*. The court explicitly held that whether the laws of obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age was a legislative matter.

The Commonwealth submits that the court below applied the proper standard for determining obscenity as set forth by this court in *Roth*.

The court below received evidence submitted by experts concerning the community standards and social value and upon conflicting evidence adjudged the books obscene.

Petitioners concede that some of the books and magazines contain photographs depicting simulated erotic activities that suggest the consummation of sexual activities. The Commonwealth submits these photographs leave nothing to the imagination and are obscene. *People* v. *Abronovitz*, 327 N.Y.S.2d 137 (1971); *Slaton* v. *Paris Adult Theatre I*, 185 S.E.2d 768 (Ga. 1971).

This Court has held that the constitution protects photographs of nudes featuring emphasis on the genital area. However, these decisions do not support the thesis that photographs depicting males suggesting sex acts with other males, or females, or females suggesting sex acts with other females are contitutionally protected. *United States* v. *New Orleans Book Mart, Inc.*, 328 F.Supp. 136 (E.D. La. 1971); *Hunt* v. *Keriakos*, 428 F.2d 606 (1st Cir. 1970).

III.

The Display Of Any Sexually Oriented Pictorial Magazines For Commercial Sale, When Surrounded By Notice To The Public Of Their Nature And By Reasonable Protection Against Exposure Of The Magazines To Juveniles Is Not Constitutionally Protected.

In *Roth* v. *United States*, 354 U.S. 476 (1957), this Court held that obscenity was not within the area of constitutionally protected speech. By definition obscenity was said to lack the valuable ideas whose dissemination the First Amendment was designed to ensure. *Roth* has not been overruled and was held to be the law in two recent decisions. *United States* v. *Reidel*, 402 U.S. 351 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971).

This Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), which held that the mere private possession of obscene matter cannot constitutionally be made a crime, has caused some to believe that the right to private possession of obscene materials carries with it a right to receive such materials through commercial sale. In announcing the decision in *Stanley*, Mr. Justice Marshall stated:

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding." 394 U.S. at 568.

On their faces, it would seem that *Roth* and *Stanley* are totally inconsistent with each other. However, this Court was quick to set straight this seeming inconsistency in *Reidel*. Mr. Justice White in delivering the opinion of the Court noted the limitations on the reach of *Stanley* when he said:

> "The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured. Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings that *Roth* held unprotected by the First Amendment." 402 U.S. at 355.

This Court further delineated the bounds of *Stanley* in *Thirty-Seven Photographs*, wherein the Court said:

> "Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad whether for private use or public distribution." 402 U.S. at 376.

Thus, *Reidel* and *Thirty-Seven Photographs* clearly recognize that the States and the Federal Government retain broad power to regulate obscenity, particularly in the commercial field.

Since *Stanley* it has been argued that the First Amendment should protect the sale of obscene materials to consenting adults where reasonable precautions have been taken to prevent exposure to juveniles. This argument has been rejected by numerous courts. *State* v. *Muldowney*, 292 A.2d

26 (N.J. 1972); *Hoffman* v. *Dickinson Operating Co. Inc.*, 468 S.W.2d 26 (Mo. 1971); *City of Moline* v. *Walker*, 274 N.E.2d 9 (Ill. 1971); *Wilhoit* v. *U.S.*, 279 A.2d 505 (D.C. App. 1971); *People* v. *Luros*, 480 P.2d 633 (Calif. 1971), cert. den. 404 U.S. 824; *People* v. *Golden*, 97 Cal. Rptr. 476 (Cal. App. 1971); *State* v. *Shackman*, 29 Ohio Misc. 56, 278 N.E.2d 61 (1971); *Slaton* v. *Paris Adult Theatre I*, 185 S.E.2d 768 (Ga. 1971); *State* v. *McCluney*, 180 S.E.2d 419 (N.C. App. 1971); *McKinney* v. *State*, 254 So.2d 714 (Ala. 1971); *May* v. *Harper*, 250 So.2d 880 (Fla. 1971); *United States* v. *Brown*, 328 F.Supp. 196 (E.D. Va. 1971); *United States* v. *Thevis*, 329 F.Supp. 205 (M.D. Fla. 1971).

The Commonwealth submits that the commercial dissemination of obscene materials, regardless of what precautions are taken to advise adults of its content and to prevent exposure to juveniles, is not protected by the Constitution.

There is the position taken by some that if pornography were legalized, it would soon lose its interest for people, and eventually the traffic would end. However, a long time ago a District Judge predicted the rise in obscenity when he observed that:

> ". . . the appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste." *United States* v. *Harmon*, 45 F. 414, 418 (D.C. Kan. 1891)

In *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 476 (1957), this Court pointed out that in an unbroken series of cases extending over a long stretch of the Court's history, it has been accepted as a postulate that "the primary requirements of decency may be enforced against obscene publications. In *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961), this Court recognized that the constitutional guaranty of free-

dom of speech did not preclude a municipality from protecting its people against the dangers of obscenity in the public exhibition of motion pictures. And *Stanley* re-emphasized that *Roth* and cases following it discerned an important Federal and State interest in the regulation of commercial distribution of obscene material.

It should not be doubted that obscenity is a cancerous canker in our culture. President Richard M. Nixon has said:

> "Pornography can corrupt a society and a civilization. The people's elected representatives have the right and obligation to prevent that corruption.
>
> The warped and brutal portrayal of sex in books, plays, magazines and movies, if not halted and reversed, could poison the wellsprings of American and Western culture and civilization . . . .
>
> Alexis de Tocqueville, observing America more than a century ago, wrote: 'America is great because she is good—and if America ceases to be good, America will cease to be great.'
>
> We all hold the responsibility for keeping America a good country. American morality is not to be trifled with." N.Y. Times, Oct. 25, 1970, § 1, at 71, col. 5-8.

This Court in *Reidel* anticipated the move to eliminate the holding in *Roth* from obscene materials between consenting adults when Mr. Justice White commented:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age." 402 U.S. at 357.

Justice White noted that the concepts involved in the law of obscenity were elusive and great expenditures of time and effort were expended in the enforcement of such laws. He further declared that the task of restructing obscenity laws belongs to "those who pass, repeal, and amend such ordinances."

The Commonwealth submits that if changes are desirable in the field of obscenity that such changes ought to eminate from the Legislatures.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment in this case be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, of counsel for the respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of September, 1972, I mailed 3 copies of the foregoing to Stanley M. Dietz, Esquire, 1029 Vermont Avenue, N.W., Washington, D. C. 20005, counsel for Petitioners.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

In the Supreme Court of the United States

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No. 71-1315

HOWARD ALEXANDER, et al.,
Petitioners,

vs.

COMMONWEALTH OF VIRGINIA
Respondent.

On Writ of Certiorari to
The Supreme Court of Virigina

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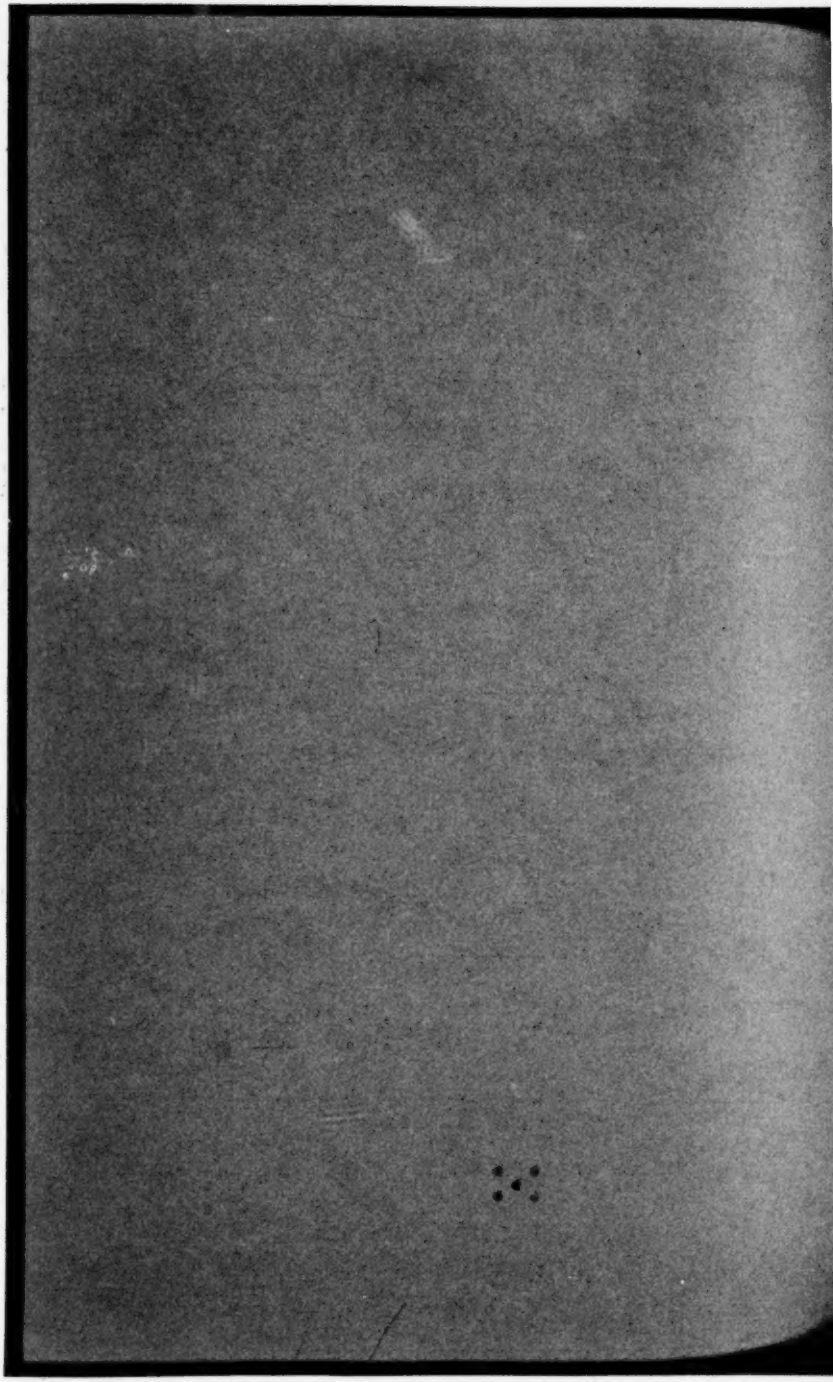

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

NO. 71-1315

HOWARD ALEXANDER, et al.,
Petitioners,

vs.

COMMONWEALTH OF VIRGINIA
Respondent.

On Writ of Certiorari to
The Supreme Court of Virigina

Joel Hirschhorn, Esq., Ralph J. Schwarz, Jr., Esq., and Mel S. Friedman, Esq., on behalf of The First Amendment Lawyers' Association, as Amici Curiae in Support of Petitioners.

Joel Hirschhorn is a member of the bar of the State of Florida and of the United States Supreme Court. He has been involved in litigation in both Federal and State courts involving the issues presented by this Amici Curiae Brief.

In accordance with the rules of this Court, consent to the filing of a Brief Amici Curiae was sought and obtained from attorneys for the Petitioners HOWARD ALEXANDER, et al., and Respondent COMMONWEALTH OF VIRGINIA, and is being filed simultaneously with the Brief herein with the Clerk of this Court.

Mr. Hirschhorn has associated with him on this Brief Ralph J. Schwarz, a member of the bar of this Court and of the State of New York. Mr. Schwarz is presently involved in litigation in both Federal and State Courts involving the same issues presented here.

Also associated on this Brief is Mel S. Friedman, a member of the bar of the State of Texas and of the United States Supreme Court. Mr. Friedman has also been involved in litigation in both Federal and State Courts involving the same issues presented here.

Messrs. Hirschhorn, Schwarz, and Friedman have prepared and presented this Brief on behalf of the First Amendment Lawyers' Association which consists of approximately seventy-five (75) attorneys practicing law throughout all State and Federal courts in the United States and who deal primarily with First Amendment and related issues.

Amici have attempted to limit the issue presented to a narrow issue dealing with a right of adults to receive materials under the First Amendment. A brief historical review of the development of the First Amendment is presented in order that the Court can properly view the complex question of the protection of the First Amendment in light of the historical development of this right. Considerable reference is made to The Report of the Commission on Obscenity and Pornography prepared pursuant to Public Law 90-100 and published by the United States Government Printing Office, Washington, D.C.

ARGUMENT

WHETHER, UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AN ADULT, PREVIOUSLY FOREWARNED, HAS THE ABSOLUTE RIGHT TO BUY, SELL, RECEIVE, WRITE, PUBLISH, DISTRIBUTE, DISSEMINATE AND/OR EXHIBIT HARD CORE PORNOGRAPHY AND OBSCENE MATERIAL TO OTHER PREVIOUSLY FOREWARNED ADULTS PROVIDING THERE IS NO ASSAULT OR INTRUSION UPON THE SENSIBILITIES OF OTHER NON-INTERESTED ADULTS, NO PANDERING, NOR JUVENILE INVOLVEMENT?

A. HISTORICALLY THE FIRST AMENDMENT PROTECTS PORNOGRAPHY AND OBSCENITY.

The Amici contend that historically the First Amendment to the United States Constitution was never intended to deny protection to pornography and obscenity. In short the **Roth-Alberts** conclusion that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. 476, 485 (1957), is historically incorrect. Like Mr. Justice Douglas, see **Memoirs v. Massachusetts**, 383 U.S. 413 (1966), 428-433 (concurring opinion, Mr. Justice Douglas), Amici contend that "obscenity" was **not** an established exception to the First Amendment guarantee of Free Speech and Press when the Bill of Rights was adopted in 1791.

During the fight for ratification of the United States Constitution it became apparent that many prominent colonialists were deeply troubled by the apparent sweeping powers of the new Federal Government. These concerns were met when, led by James Madison, twelve proposed amendments were approved by Congress in September, 1789. Ten of these were ratified by the individual States and on December 15, 1791, the "Bill of Rights" became part of the United States Constitution. It is significant to note that at the time of the enactment of these amendments:

1. Only one colony, Massachusetts, had a statute prohibiting "intemperance, immorality and profaneness", which was enacted in 1711; the first State statute prohibiting commercial distribution of obscenity was enacted in Vermont in 1821; the first Federal statute, was enacted in 1842.

2. Lumped together with religion, Freedom of Speech was clearly intended to be as absolute as the right of one to choose his own form of religious worship.

3. The mandatory language of the First Amendment, like that of the other nine amendments, make it clear that absent overwhelming justification, the Freedoms of Religion, Speech, Assembly and Petition are absolute.

4. Only specific, narrow exceptions to these limitations on the powers of the new Federal Government would be permitted, such as criminal libel, and the Alien and Sedition Acts. The reports of the First Congressional debates regarding these proposed amendments are ap-

parently incomplete but inference is clear that the Bill of Rights was intended to curb and not extend Federal (i.e. Governmental) Powers, see Kronvitz, **Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly**, pp. 345-361 (1957).

5. The First Amendment guarantee of Freedom of Speech and Press was designed to insure absolute freedom from governmental control of the newspaper and publishing industry in general, and was not intended as a proscription against obscenity or pornography because the publication of such material was not a secular crime at Common Law in 1791, see Point C, infra.

Thus it is clear that the **Roth-Alberts**, supra, conclusion of obscenity is not protected is incorrect, and ought to be reversed.

B. OBSCENITY PER SE FALLS WITHIN THE PROTECTION OF THE FIRST AMENDMENT.

As stated, **Roth v. U.S.**, supra, held that obscenity was outside the protection of the First Amendment based on premises stated in that decision which Amici submit on reconsideration are not constitutionally valid for either the several States or the Federal Government. Indeed, it is submitted there is no valid justification for the automatic exclusion from First Amendment protection of a form of expression called obscenity. In fact, and law, there are compelling reasons consistent with the First Amendment why it should not be excluded. Moreover, where the exercise of First Amendment rights is claimed to be abridged, it is the function of this Court to weigh the

circumstances and appraise the substantiality of the reasons advanced in support of such laws and regulations, **Thornhill v. Alabama,** 310 U.S. 88, 95, 96 (1940). By obscenity Amici refer, of course, to the material itself or the obscenity per se on the assumption that the mode of commercial distribution is such that only a willing, consenting adult, who has been previously forewarned of the contents is the purchaser or viewer. While the justifications advanced for the automatic exclusion of obscenity tend to overlap they break themselves generally into three categories.

The first justification for claiming that obscenity is outside the pale of the First Amendment stems from the fact that laws regulating profanity, blasphemy and criminal libel had been deemed, especially in the early stages of the formation of the Union, to be outside the protection of the First Amendment. The essential rationale underlying the justification for excluding such utterances from First Amendment protection, as set forth in **Beauharnais v. Illinois,** 343 U.S. 250, 256, 257 (1952), and **Chaplinsky v. New Hampshire,** 315 U.S. 568, 571-572 (1942), is that "fighting words" which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. By dicta, habit and automation stemming, undoubtedly, from a lack of any real need to focus on the issue, obscenity was always linked with the profane and libelous utterance. However, the rationale for the **automatic** exclusion of the profane and criminally libelous utterance has been seriously undermined and essentially overruled recently in **Ashton v. Kentucky,** 384 U.S. 195 (1966), **Cohen v. California,** 403 U.S. 15 (1971), **Cantwell v. Connecticut,** 310 U.S. 296 (1940). Hence, the justification for the automatic exclusion of obscenity must

fall. Moreover, assuming any justification for the automatic exclusion of criminal libel, a libel does inflict injury because it is false and is not any step in the search for truth because the libel by its very nature is false. A picture of a man and woman engaged in coitus when viewed by one who wants to view it does not inflict any injury on the viewer and is not per se false.

The second justification for the automatic exclusion of the obscene is the erroneous assumption that the First Amendment protects only the expression of ideas, connoting an intellectual communication. The First Amendment however, protects every expression and communication be it for purposes of entertainment, amusement, or fulfilment of a person's intellectual or emotional needs, and regardless of its worth, and is not limited just to the expression of an idea, **Winters v. New York,** 333 U.S. 507, 510 (1948), **Hannegan v. Esquire,** 327 U.S. 146 (1946), see also 72 Y.L.J. 877, 879 (1962).

The third apparent justification is that the viewing of obscenity leads to anti-social conduct and illegal behavior, and has an adverse impact on personality, and an adverse moral impact. There is virtually no scientifically accepted empirical data that obscenity or pornography lead to any crimes of sexual violence or other anti-social behavior as this Court has already recognized, **Stanley v. Georgia,** 394 U.S. 557, at 566 nt 9 (1969). Indeed, the data collected shows no causal relationship between "obscenity" and any criminal conduct, see generally Report of President's Commission on Obscenity and Pornography and Point D, infra.

The argument that obscenity has an adverse moral impact serves to emphasize the fact that obscenity does indeed convey ideas (although presumably bad), otherwise there would be no objection to it.

1. THE PROFANE AND LIBELOUS FIGHTING WORDS EXCEPTION.

As stated above the automatic exclusion of obscenity as being outside the penumbra of the First Amendment sought to be justified is by analogy to the exclusion of the profane and the libelous. Recently, however, the premise underlying **Chaplinsky**, supra, has been denounced and there is now no justification for the exclusion of the so-called "obscene".

In **Cohen v. California**, supra, the defendant was convicted of violating a section of a California Penal Code which prohibited maliciously and willfully disturbing the peace and quiet of any neighborhood or person by offensive conduct. The defendant's conduct consisted of wearing a jacket in a Los Angeles, California, Courthouse which bore the words "Fuck the Draft". In common parlance, these words would certainly be considered profane and vulgar and as the Court observed, 403 U.S. 20, words "not uncommonly employed in a personally provocative fashion". Despite the fact that these words are generally regarded as profane, vulgar and used as an insult, the Court held the conviction could not stand on the grounds that while the use of the words was inherently likely to cause violent reaction, it was not shown that the words were directed at any one, and that the phrase in question

demonstrated defendant's feelings. The case also demonstrates a clear reversal of the **Chaplinsky** principle.

In **Ashton v. Kentucky**, 384 U.S. 195 (1966), the petitioner was convicted for committing the common law crime of criminal libel. This Court held the statute in question unconstitutional and reversed the defendant's conviction. In doing so, this Court relied in great part on cases involving breach of the peace offenses and especially **Cantwell v. Connecticut**, 310 U.S. 296 (1940), Cantwell was convicted for breach of the peace for playing a phonograph record, in a public place, which attacked religion and the Catholic church in general. When a listener objected Cantwell left. In **Cantwell**, supra at 309, this Court pointed out that provocative language amounting to a breach of the peace has almost always consisted of "profane, indecent or abusive remarks directed to the person of the hearer". In short then, this Court has recognized in the case of the profanity and the criminal libel that it is not just a matter of the public utterance of the words per se but rather whether the words are directed at a particular hearer under circumstances where he cannot avoid them.

The profane and the criminal libel are not therefore just automatically excluded from First Amendment protection. The States do not have the power to regulate such utterances or the basis that they are automatically outside the protection of the First Amendment. The presumption then that the so-called obscene is automatically excluded from First Amendment protection must likewise fall, for the justification for the automatic exclusion of obscenity has stemmed from the automatic exclusion of utterances which are ipso facto profane or libelous.

Moreover, it is hard to understand the rationale for the conclusion that the obscene and profane is outside the First Amendment except that historically they had been erroneously linked and that the "obscene" was bad and, therefore, deemed an insult. In addition, there is even less basis for the automatic exclusion of the "obscene" where purchased or viewed by a consenting forewarned adult. There is absolutely no basis to conclude that such utterances could inflict injury on such a consenting adult.

Amici's position is strengthened by two recent decisions of this Honorable Court, **Gooding v. Wilson**, 405 U.S. 518 (1972), and **Rosenfeld v. New Jersey**, ____ U.S. ____, 33 L.Ed.2d 321 (1972). In **Rosenfeld**, supra, this Court vacated and remanded appellant's conviction under a New Jersey statute prohibiting the use of profane or indecent language in a public place in light of **Gooding**, supra, and **Cohen**, supra. In **Rosenfeld**, supra, appellant had used the phrase "Mother Fucker" on four separate occasions to describe the teachers, school board, the town, and the United States of America, at a public school board meeting attended by about 150 people, 25 of whom were minors, and 40 of whom were women (and thus presumably sensitive to such language). Even dissenting Justice Powell recognized, however,

> But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case, 33 L.Ed.2d at 324.

2. THE FIRST AMENDMENT PROTECTION IS NOT LIMITED TO THE EXPRESSION OF IDEAS AND FURTHER OBSCENITY CONVEYS IDEAS.

This Court has recognized that the First Amendment is not limited to the exposition of only popular ideas but covers expressive matter commercially distributed even though it is entertaining or vulgar, **Winters v. New York**, supra, 335 U.S. 507, 510 (1948), **Hannegan v. Esquire**, 327 U.S. 146, supra. In **Cohen v. California**, supra, 403 U.S. at 26 this Court recognized that an expression conveys "not only ideas but otherwise inexpressible emotions as well".

While the search for the truth through ideas is one very critical basis for the First Amendment, it is not the only basis. Clearly, the First Amendment protects non verbal expession, see 72 Yale L.J. 877, 879, (1962).

The justification for excluding obscenity on the assumption that the First Amendment protects only the written or verbal expression of an idea is therefore not accurate. Furthermore, this question of whether even obscene expressive utterances (or publications) are to be excluded on the grounds that such material conveys no ideas itself refutes one of the justifications for excluding obscenity. 79 Yale Law Journal 209, 211, 212, (1969-70).

One of the basis for excluding obscenity is allegedly that it has a harmful moral impact and leads to the disintegration of the moral fibre. Assuming this to be a justification (though it is not) obscenity could not have such an impact unless it did indeed present ideas and

stimulate argument and debate. 79 Yale Law Journal 211, 212, 216, (1969-70).

We live in a highly mobil, fragmented society with woman's equality a foregone conclusion, if not yet a realty. The role of sex in society is a critical one. The presentation of the so-called obscene forces people to reevaluate their own attitudes on this subject. In fact, even the so-called obscene aids in the never ending search for the truth. The so-called obscenity reflects in major part a change in attitudes about sex and is one factor which helps people to evaluate and reevaluate their ideas and attitudes about the roles of men and women and sex attitudes in our ever changing society. The notion that obscenity does not convey an idea is simply not true, 79 Yale L. J. at 215, 216. If pornography did not convey ideas there would be no murmur (much less the hue and cry), about its presentation to consenting adults.

3. THERE IS NO CASUAL RELATIONSHIP BETWEEN PORNOGRAPHY AND HARMFUL CONDUCT.

As stated, this Court has already recognized that there is little, if any empirical evidence that obscenity induces crimes of sexual violence, **Stanley v. Georgia**, supra. There is no scientific basis for a presumption that it induces violent conduct or crimes of any kind and governmental studies have shown the contrary, see the Report of the Commission on Obscenity and Pornography, supra.

Thus, this Court has stated:

> Criminal statutory presumptions must be regarded as irrational or arbitrary and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, **Leary v. United States**, 395 U.S. 6, 89 S.Ct. 1532, 1548 (1969).

Of course, the most widely recognized exception to the First Amendment is where the exercise of the Freedom of Speech and/or Press results in or creates a "clear and present danger" to society or some segment thereof, **Schenck v. United States**, — U.S. —, 39 S.Ct. 247 (1919). That is, will the exercises of the First Amendment in the manner under review, "bring about the substantive evils that Congress has a right to Prevent"? As asserted in **Schenck**, supra, this question is one of "proximity and degree".

In light of the conclusions of the extensive studies, (i.e. the Report of the Commission on Obscenity and Pornography), done at Presidential request and governmental expense, how can it be argued that obscenity and pornography is not entitled to the protection of the First Amendment? Assuming the conclusions of the Report to be true, even hard core pornography has no harmful impact on the recipient and thus creates no "clear and present danger". It follows therefore that there is no constitutional justification for the continued governmental repression and suppression of sexually oriented material.

This conclusion is even further strengthened by this Court's holding that:

> The Government "thus carries a heavy burden of showing justification for the imposition of such a [i.e. prior] restraint". **New York Times Company v. U. S.** [Pentagon Papers Case] — U.S. —, 91 S.Ct. 2140 (1971).

Neither the States nor the Federal Governments can sustain justifying prohibiting forewarned consenting adults from buying, selling, receiving, writing, publishing, distributing, disseminating or exhibiting obscene materials to other consenting forewarned adults.

C. WHETHER FOREWARNED CONSENTING ADULTS HAVE THE ABSOLUTE RIGHT TO ENJOY FOR THEIR OWN PRIVATE PERSONAL ENTERTAINMENT AND/OR DESIRE HARD CORE PORNOGRAPHY AND OBSCENITY.

> The rights guaranteed by the Constitution or otherwise are not absolute rights in the sense that they entitle a citizen to act in any way he pleases. Rather he must exercise his rights in such a way that the rights of others are not denied. . . Honorable Sam J. Ervin, Jr. (D., N.C.) "Layman's Guide to Individual Rights Under the United States Constitution," 3rd Ed. (Government Printing Office, Washington, D. C., 1972).

Assuming, arguendo, Senator Ervin's remarks that constitutional rights are not absolute, to be true, it is clear that so long as one's private acts do not disparage the rights of others, this right (of privacy) is absolute. And, if this Court accepts the conclusions of the Report of the Commission on Obscenity and Pornography, infra, then a forewarned consenting adult has the absolute right to receive for his (or her) own private enjoyment or entertainment, or use, even hard core sexually oriented material of the most depraved and foul nature imaginable, **Stanley v. Georgia,** 394 U.S. 557 (1969). Of course, this absolute right to receive under the protective penumbra of the First and Ninth Amendments, **Griswold v. Connecticut,** 381 U.S. 479 (1965), is meaningless unless some other adult (individual or corporate) has the absolute right to offer for sale or exhibition the materials necessary to meet this right receive, **U. S. v. Langford,** 315 F.Supp. 193, (Minn. 1970), and **U. S. v. Lethe,** 312 F.Supp. 421 (Cal. 1970).

Amici's position stated simply is that:

1. The right to buy, receive, write, publish, distribute, disseminate, sell, or exhibit hard core pornographic and obscene material was protected, at Common Law, from secular courts.

2. The Ninth Amendment to the Constitution protects and preserves for the people all rights they enjoyed prior to the enactment of the United States Constitution.

3. Present case law protects and preserves private sexual acts of consenting adults.

4. Both the Fourteenth Amendment equal protection of the laws clause and **Stanley v. Georgia**, supra, protects the right to receive and the collateral right to sell or exhibit hard core pornography and obscene materials provided of course there is no pandering, juvenile involvement, nor intrusion upon the sensibilities of unwilling adults. Amici will treat each of these four arguments separately.

1. THE COMMERCIAL PUBLICATION, DISTRIBUTION, SALE AND/OR EXHIBITION OF OBSCENE MATERIAL WAS NOT A CRIME, AT COMMON LAW, PUNISHABLE BY SECULAR COURTS.

The crime of publishing, distributing, selling, and/or exhibiting obscene material is of recent vintage. Some eighty-three (83) years prior to the enactment of the First Amendment, the Star Chamber held in a per curiam opinion, that:

> A crime that shakes religion (a), as profaneness on the stage, & c. is indictable (b); but writing an obscene book, as that entitled "The Fifteen Plagues of a Maidenhead," FPM, is not indictable but punishable only in the Spiritual Court (c). **Queen v. Read,** Case No. 205, Michaelmas Term, 6 Queen Anne, S.C., 2 Stra. 789, 11 Mod. Rep. 142 (1708).

Subsequent British Decisions punished, initially, "obscene libel", **King v. Curl**, 2 Stra. 788 (1727); but it was not until 1824 that a statute was enacted in England permitting **secular** prosecution for a public exposure of ob-

scene material, 5 Stat. Geo. 4, C. 83. Thus, at the time of the enactment of the Ninth Amendment, obscenity, (i.e., eroticism sans blasphemy), was **not** a crime in England.

Moreover, only one colony, Massachusetts, had a statute prohibiting commercial obscenity prior to 1791, (this statute was entitled "an act against intemperance, immorality, and profaneness, and in reformation of manners"). The other colonies left the question of obscenity to the Spiritual Courts. The first state to enact a statute prohibiting commercial distribution of obscenity was Vermont in 1821, Laws of Vermont, 1824, Ch. XXIII, No. 1, Section 23. And, it was not until twenty-one (21) years thereafter that Congress enacted its first law prohibiting the introduction of obscene material into the United States, 5 U.S. Stat. 566 (1842).

The Report of the Commission on Obscenity and Pornography, at page 297-298, traces the history of the merger of religious profaneness, blasphemy and obscenity. The conclusion is inescapable that when **Read**, supra, was acquitted in 1708 for writing the sexually obscene book, "The Fifteen Plagues of a Maidenhead", because the book libeled no one, did not attack the Government of England, and was not blasphemous, the matter was one best left to the "Spiritual Court".

The Ninth Amendment of course provides that:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

In essence, the Ninth Amendment means that whatever rights the people had at Common Law were retained by the people **despite** the ratification of the United States Constitution in 1789. The next step then is both logical and simple. If, at Common Law, a person had the right to write, without being punished, a sexually obscene book, c.f. **Read,** supra, then this right survived the enactment of the United States Constitution and the Amendments thereto. It is elemental that statutes in derogation of Common Law are to be strictly construed. Thus the assumption that "obscenity is not protected," is erroneous and must fall.

2. THE NINTH AMENDMENT RIGHT OF PRIVACY PROTECTS AND PRESERVES THE RIGHT TO RECEIVE, OR VIEW, EVEN HARD CORE PORNOGRAPHY.

The Ninth Amendment, does not, per se, grant "substantive" rights. Rather, this, until recently little understood, Amendment preserves a basic right of man, the right of privacy. While at one time there appeared to be a great disagreement as to precisely what the Ninth Amendment meant, Garvey, Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill, 1971 Wisc. L. Rev. 992, 928-932, this Court's opinion in **Griswold v. Connecticut,** 381 U.S. 479 (1965), may well have laid the intellectual and academic debate to rest.

In essence, **Griswold,** supra, held that the right of privacy, "between consenting married adults", is protected against State invasion, by the First Amendment when read with the other Amendments. The "penumbra

of rights" elucidated in **Griswold,** has of course been reaffirmed, most recently by this Court in **Eisenstadt v. Baird,** ____ **U.S.** __, 92 S.Ct. 1029 (1972). The question of whether this "right of privacy" is absolute or not is answered simply by the observation that individual liberties ought to be limited only when they are in conflict with the rights of others, **Public Utilities Commission v. Pollak,** 343 U.S. 451 (1952); and after all, that is precisely the proposition for which **Redrup v. New York,** infra, stands.

Stanley v. Georgia, supra, makes it clear that a man's home is the private castle in which he may, for his own personal wishes, enjoy hard core pornography. The "right of privacy" is more than a physical dwelling, however, it is the "privacy of thought," pure or otherwise, provided no one else is harmed. Our democracy functions, in large part, because we enjoy freedom of thought and access to even unpopular ideas. The Ninth Amendment protects this right. This Court must preserve that right and make it meaningful. If Rich **Stanley,** supra, has his right of privacy, so must everyman.

3. THE PRIVATE, SEXUAL ACTS AND CONDUCT, OF FOREWARNED ADULTS, ARE PROTECTED UNDER THE FIRST, FIFTH, NINTH AND FOURTEENTH AMENDMENTS.

It is not the function of our laws to impose a moral code; moreover, no immoral conduct, no matter how rehensible ought to be a basis for a criminal law unless the conduct is harmful to others, or self-destructive. The manner in which an **adult** conducts his own private affairs in life is his own personal matter. This right to be free

has been articulated by Mr. Justice Brandis in his now famous dissenting opinion in **Olmsted v. United States,** 277 U.S. 438 (1928), quoted with approval in **Stanley v. Georgia,** supra:

> The makings of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their **beliefs,** their **thoughts,** their **emotions,** and their **sensations.** They conferred, as against the Government, **the right to be let alone** — the most comprehensive of rights and the right most valued by civilized men. [Emphasis added.]

This right to be free has of course been expanded considerably since **Griswold,** supra, which of course dealt with the right of married adults to receive birth control devices and/or counseling; c.f. **Eisenstadt,** supra, which declared unconstitutional a Massachusetts statute which permitted married persons to obtain contraceptives to prevent pregnancy, but prohibited distribution of contraceptives to single persons for the same purposes. This Court in **Eisenstadt,** supra, went on to assert that:

> If the right of privacy means anything, it is the right of individual, married or single, to be free from unwarranted Governmental intrusion into matters so fundamentally affecting a person as their decision whether to bear or beget a child. See **Stanley v. Georgia,** 394 U.S. 557, 89

> S.Ct. 1243, 22 Lawyers Ed.2d 542 (1969). See also **Skinner v. Oklahoma, ex rel., Williamson,** 316 U.S. 5353, 62 S.Ct. 1110, 86 Lawyers Ed. 1655 (1942); **Jacobson v. Massachusetts,** 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 Lawyers Ed. 643 (1905), 92 S.Ct. 1038, [footnotes omitted].

In addition to the problems of birth control decided in **Griswold,** supra, and **Eisenstadt,** supra, much litigation and legal scholarship have centered on the problems of others and their private sexual conduct. For example with respect to Sodomy, see Hollis, "Criminal Law—Sexual Offenses — Sodomy — Cunnilingus, 8 Natural Resources J. 531(1968); Johnson, Sodomy Statutes — A Need for Change, 13 S.D.L. Review, 384 (1968); Note, Sodomy — Crime or Sin?, 12 University Fla. Law Review, 83 (1959), and also **Cotner v. Henry,** 394 F.2d 873 (1968); Abortion, **United States v. Vuitch,** 402 U.S. 62 (1972), and **State v. Barquet,** 262 So.2d 431 (Fla. 1972), and the cases cited therein, as well as **People v. Belous,** 80 Cal. Rptr. 354, 458 P.2d 194 (1969); Homosexual Activities, **Smayda v. United States,** 352 F.2d 251 (9th Cir. 1965). All of these cases have one common thread, like **Stanley,** supra, the question involved is a moral, not legal one.

Thus the basic question of the **function** of the law is raised. In the famous English Wolfenden Report of 1957, the authors concluded that:

> It is not . . . the function of law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behavior, Wolfenden Report at 9-10.

Moreover, it is the function of the courts, if they are to protect individual liberties from Governmental encroachment to independently evaluate data with reference to the society in which the courts function, c.f. Doss & Doss, "On Moral, Privacy and the Constitution," 25 Univ. Miami Law Review 395, 404 (1971). Thus the Report of the Commission on Obscenity and Pornography and its conclusions with respect to private acts between consenting adults becomes significant when tested by the right of privacy.

Amici contend that the right to buy, sell and commercially distribute and/or exhibit hard core pornography is as protected as the woman's right to choose to bear children, and to freely choose one's own sex partner, provided there is no pandering, intrustion, or juvenile involvement. What man, what justice, what court can tell another man what to read, view, or think about in the privacy of his own thoughts?

4. FEDERAL AND STATE LEGISLATION WHICH SEEK TO PROHIBIT COMMERCIAL DISSEMINATION OF HARD CORE PORNOGRAPHY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Amici contend that obscenity legislation has a discriminatory affect under the Fifth and Fourteenth Amendments to the United States Constitution for which neither the Federal nor various State Governments have a rational basis. It is elementary that the Fifth and Fourteenth Amendments' Equal Protection Clauses prohibit the Fed-

eral and State Governments from enacting legislation which unreasonably and/or arbitrarily discriminates against one identifiable group or individually in favor of another, **Reed v. Reed,** ____ U.S. ____, 92 S.Ct. 251 (1971).

This Court in **Stanley v. Georgia,** supra, gave protection to obscene materials found in the sanctity, (and privacy), of the home. The result of this case coupled with obscenity legislation against public exhibition and distribution gave to the rich man who could afford to purchase (even) obscene materials the right to view same in his home while the poor person was precluded entirely from such conduct. The less fortunate could neither afford the initial purchase nor in the case of movies the paraphanalia which are necessary for private exhibition. Thus the poor **Stanley,** who is denied the right to view this material at a movie theatre, or book store, is by operation of law being discriminated against contrary to the Fifth and Fourteenth Amendments see **U.S. v. Langford,** supra, and **U.S. v. Lethe,** supra.

This Court has most recently held in **Mayer v. Chicago,** ____ U.S. ____, 92 S.Ct. 410 (1971), that a transcript could not be denied in a criminal case where a fine was imposed merely because the defendant could not afford to pay for the transcript. This Court stressed:

> **The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay** is not erased by any differences in the sentences that may be imposed. (Emphasis added.)

C.f. **Argersinger v. Hamlin**, U.S. Supreme Court Case No. 70-5015, ____ U.S. ____, 11 Cr.L. 3089 (June 12, 1972).

A similar situation arose in **Williams v. Illinois**, 399 U.S. 235 (1970), where this Court found an impermissible discrimination, resting on ability to pay, which existed when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court cost. See also **Boddie v. Connecticut**, 401 U.S. 371 (1971), Mr. Justice Douglas concurring, where indigents were denied equal protection of the laws in that they could not obtain divorces because of the expenses necessary to gain access to the courts.

Amici would further contend as emphasized above that a fundamental right is involved and thus both the Federal and State Governments must demonstrate an overriding and compelling interest to justify the discrimination. In **Skinner v. Oklahoma**, 316 U.S. 535 (1942), the court found marriage and procreation to be fundamental rights and further that the State showed no compelling State interest to justify sterilization of certain convicted felons and not others.

In **Shapiro v. Thompson**, 394 U.S. 618 (1868), this Court was faced with the constitutionality of waiting periods, i.e., residency requirements, for welfare recipients. This Court held:

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the state for one year would seem irrational and unconsti-

> tutional. But of course the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the strictest standard of whether it promotes a compelling State interest. Under this standard the waiting period requirement clearly violates the Equal Protection Clause.

Neither the Federal nor State Legislatures can show a compelling interest to justify why a poor person is deprived access to the same erotic material a rich man can easily view in the comfort of his own home. A review of **Stanley v. Georgia**, supra, and its background makes this proposition the next logical step.

In **Stanley**, the United States Supreme Court specifically held that the First and Fourteenth Amendments protect private possession of obscene press materials. Thus, inherent in the right to possess is the right to receive. Said the Court in **Stanley**:

> (3, 4) It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive . . . **Martin v. City of Struthers**, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943); see **Griswold v. Connecticut**, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); **Lamont v. Postmaster General**, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); c.f. **Pierce v. Society of the Sisters**, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.

1070 (1925). This right to receive information and ideas, regardless of their socialworth, see **Winters v. New York**, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society, 394 U.S. at 564.

It is interesting to note that in **Stanley** particular reliance is placed upon the opinions in **Martin v. City of Struthers**, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, and **Griswold v. Connecticut**, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, two cases which emphasize the First Amendment right to receive all media of expression. In **Martin**, Mr. Justice Black, speaking for the Court, said:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they choose to encourage a freedom which they believe essential if vigorous enlightenment was ever to triumph over slothful ignorance. **This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it.** The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved, 319 U.S. at 143, 146-147 [emphasis added].

In **Griswold v. Connecticut**, Mr. Justice Douglas, speaking for the Court, said:

> . . . The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. **The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read** . . . and freedom to teach . . . indeed the freedom of the entire university community . . . without those peripheral rights the specific rights would be less secure, 381 U.S. 482, 483, [emphasis added].

In **Lamont v. Postmaster General**, quoting Justice Brennan's concurring opinion, 381 U.S. 301, 308 (1965) (which was cited in **Stanley**):

> The right to receive publications . . . is a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers.

The entire opinion and reasoning of the Supreme Court in **Stanley** take on the broader dimension of "mere private possession." It is true that the facts of **Stanley** involve a seizure of obscene materials from Stanley's bedroom but the language of the opinion clearly suggests that States have no business under the First and Fourteenth Amendments of the United States Constitution to

attempt to regulate the moral contents of a person's thoughts. This Court unequivocably held:

> Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. . . . The State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . . . **Finally we are faced with the argument that the prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution . . . . we are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. . . . We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth** and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home, 394 U.S. at 566-568 (emphasis added).

Clearly, by its reliance upon cases involving distribution and receiving of expression, **Martin, Griswold, Lamont,** and others, **Stanley** also stands for the proposition that inherent in the right to possess is also the right to receive.

Several lower courts have already expressed the view Amici press instanter, for example, in **United States v. Lethe,** supra, that court held, "that a person has a constitutional right to buy or receive obscene material." 312 F.Supp. at 424. The court went on to state that:

> The final step is not difficult. Can it be reasonably argued that although the government may not directly prevent someone from buying a book, it may achieve the same result indirectly by making it a crime to sell the book to him? I think not, unless the Government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying, 312 F.Supp. at 424.

Similarly **United States v. Langford,** supra, held that in the absence of **Redrup v. New York,** 386 U.S. 767 (1967) proscriptions, that even though materials are hard core pornography, "accepting the major premise in **Stanley v. Georgia** as the law, the logic of the **Lethe** case and the result it reaches seem unassailable," 315 F.Supp. at 194.

The Second Circuit Court of Appeals likewise has come to a similar conclusion in **United States v. Dellatia,** 433 F.2d 1252 (2d Cir. 1970). There appellant's conviction for a violation of 18 USC, Section 1461 was reversed based in large part on **Stanley v. Georgia,** supra, and the additional fact that the Government had failed to show a compelling interest, i.e., **Redrup** type conduct. Similarly the United States Court of Appeals for the District of Columbia has held in **Williams v. District of Columbia,** 419 F.2d 638 (CADC 1969), that:

> ". . . That the State has no 'right to protect the individual's mind from the effects of obscenity' simply because it wishes 'to control the moral conduct and content of a person's thoughts.' This, the court said, would be inconsistent with the 'philosophy of the First Amendment,'" 419 F.2d at 645.

It would serve no useful purpose to supply additional cases of either Federal or State courts in which great reliance was placed on **Stanley v. Georgia,** supra. From the time **Stanley v. Georgia,** supra, was decided until this Court rendered its opinions on May 3, 1971, in both **United States v. Reidel,** 402 U.S. 351 (1971), and **United States v. Thirty-Seven Photographs,** 402 U.S. 363 (1971), the natural assumption by legal scholars and judicial officers as well as exhibitors and disseminators of allegedly obscene material, was that the logical extension of **Stanley** would permit consenting adults in nonobtrusive circumstances to purchase and/or exhibit even hard core pornography. This Court, of course, foreclosed, apparently, this logical extension in holding that the use of the United States mails to distribute admittedly obscene materials was conduct which would be punished by appropriate criminal process, **(Reidel)**; and further that the Tariff Act of 1930, Section 305(a), 19 USC, Section 1305(a) and related sections, were constitutional and did permit the seizure upon reentry into the United States' borders of admittedly obscene material, even though these materials were intended solely for private use, (37 **Photographs**). Amici contend of course that the issue of the right of the Federal Government to prohibit of in commerce in obscene material is separate and apart from the underlying philosophy and scope of **Stanley v. Georgia.** It seems clear

that in retrospect that both **Reidel**, supra, and **Thirty-Seven Photographs**, supra, fly in the face of **Stanley v. Georgia**, and the latter is far more consistent with both the historical and modern concept of the First Amendment, especially when tested by the Fifth and Fourteenth Amendments.

For this Court to hold otherwise would be to give to the citizens and residents of the United States an empty right under **Stanley v. Georgia**, supra. For, the right to receive in the privacy of one's own home, even hard core pornography, is meaningless unless one also has the collateral right to purchase such material. Obviously someone must have the right to sell or exhibit this material in order for **Stanley**, supra, to be available to the poor man as well as the rich.

D. IN THE ABSENCE OF EMPIRICAL DATA SUPPORTING THE ASSUMPTION THAT OBSCENE MATERIAL IS HARMFUL, THERE IS NO RATIONAL BASIS TO MAKE CRIMINAL THE BUYING, SELLING, RECEIVING, PUBLISHING, DISTRIBUTING, OR EXHIBITING OF SEXUALLY EROTIC MATERIALS TO ADULTS FOREWARNED OF ITS NATURE.

Law in any field, to be adequate and sound must rest on facts. It must grow out of experience. Thus research designed to make systematic investigations into human experience becomes indispensable to the healthy growth of the law. Erwin N. Griswald, Dean, Harvard Law School; Foreward in **Unraveling Juvenile Delinquency**, by Glueck, 1950.

The United States Congress found traffic in obscenity and pornography to be of national interest and further found that the Federal Government had a responsibility to investigate the gravity of the situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the dissemination of such material. The Commission on Obscenity and Pornography was established by Public Law 90-100 (1967).

Ironically,

> Before the findings of the commission were actually published, it was revealed that this body had drafted a report which was in direct contravention to what its sponsors believed such a commission would urge. **Censorship: For and Against,** Hart, pp. 7 (1971).

In, **The Report of the Commission on Obscenity and Pornography,** hereafter referred to as the **Report,** the Commission set forth the results of its study, and its various conclusions and recommendations, all of which were derived from the extensive socio-scientific study undertaken.

The focal point of the Commission's decision was that no social justification exists for the retention or enactment of broad legislation prohibiting the consensual distribution of sexual materials to adults and that the primary area of public concern was the thrusting of offensive materials upon unwilling recipients and the fear that these materials might be distributed to minors. The

Commission concluded that these two areas could be regulated effectively by legislative prohibitions, **Report** at 42-43.

The Commission's conclusion was based on several considerations, First:

> Extensive empirical investigations, both by the Commission and by others, provides **no evidence** that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms, such as crime, delinquency, sexual or non-sexual deviancy or severe emotional disturbances. **Report** at 52 (and 56).

One study for example showed that eighty (80) percent of the social-psychiatric clinicians consulted reported that they never encountered a case in which "pornography" appeared to be a factor in producing anti-social sexual behavior. The study also found that eighty-four (84) percent of the psychiatrists and psychologists disagreed with the statement "persons exposed to pornography are more likely to engage in antisocial sexual acts than person's not exposed," **Report** at 161. The Commission in fact added that analysis of the United States Crime rates do not support the thesis of a causal connection between the availability of erotica and sex crimes among either juveniles or adults and that studies showed that adult sex offenders are not significantly different from other adults in exposure or in reported arousal or reported likelihood of engaging in sociosexual behavior following exposure to erotica, **Report** at 242.

It should further be noted that the limited amount of information concerning the effects of sexually explicit materials on children was a factor which led the Commission however to be restrictive in the area of minors.

A second consideration upon which the Commission reached its conclusion was that public opinion in America did not support the imposition of legal prohibitions on the right of adults to read or see explicit sexual materials. The majority of the American people presently are of the view that adults should be legally able to read or see explicit sexual materials if they wish to do so, **Report** at 43, 53.

Further findings were the fact that studies showed that explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults, society's attempts to legislate for adults in the area of obscenity have not been successful and are extremely unsatisfactory in their practical application; and the fact that expenditures of considerable law enforcement resources are involved where there appears no justification to support these expenditures, **Report** at 52-53.

Finally and of great importance to the Commission was:

> The spirit and letter of our constitution tell us that government should not seek to interfere with these rights (press and speech) unless a clear threat of harm makes that course imperative. Moreover, the possibility of the misuse of

> general obscenity statutes prohibiting distribution of books and films to adults constitute a continuing threat to the communication of ideas among Americans — one of the most important foundations of our liberties, **Report** at 54.

The Legal Panel of the Commission did an in depth and extremely comprehensive report of the legal history of obscenity decisions, **Report** at 293-369.

Of utmost importance is the Commission discussion of **Roth v. United States**, 354 U.S. 476 (1957), and subsequent cases. The Commission found that the **Roth**, supra, case held that prohibition upon the distribution of obscene material to consenting adults to be constituted without reliance upon authoritative findings or conclusions regarding the social effects of such material, **Report** at 357.

The Commission went on to say to 358:

> Developments since the Roth decision have suggested both practical and constitutional doubts about appropriateness of its conclusion that distribution of "obscene" materials to consenting adults may constitutionally be broadly prohibited without reference to considerations of social harm. These developments have been in three areas: (a) The enormous practical difficulties under **Roth** of meaningfully defining what is "obscene" for consenting adults and of fairly applying such definitions in legal proceedings; (b) changing public opinion regarding the need for and the wisdom of prohibiting distribution

of sexual materials to consenting adults; (c) Developing constitutional doctrine holding that free expression guarantees apply to "obscene" materials in at least some adult contexts.

The Commission went on to discuss all of the above points and put special emphasis on the Constitutional issues stating; at 358-359:

> The fundamental premise of **Roth** — that protections accorded to speech by the Constitution are wholly inapplicable to "obscene" material — was apparently rejected by the Supreme Court in 1969 in **Stanley v. Georgia.** There the court indicated that, even where material is "obscene", the individual citizen nevertheless has a constitutionally protected right, if he so wishes, to read or view such material at least in his own home. Obscenity prohibitions which interfere with this right appear to require the support of a sufficient governmental interest. The protection of juveniles from exposure to obscene materials and the protection of individual sensibilities against materials involuntary thrust upon persons who do not wish to see them were recognized in **Stanley** as legitimate governmental concerns. On the other hand, **Stanley** appears to have held that government may not rest prohibitions upon what consenting adults may read or view upon a desire to control their morality, or upon a desire to prevent crime or antisocial behavior, at least, **in the absence of a solid empirical foundation.** [Emphasis added.]

The areas where a rational basis for legislation prohibiting explicit sexual materials exists was stated in **Redrup v. New York,** 386 U.S. 767 (1967). These include situations where minors are involved, or where materials are thrust upon persons who do not wish to see them, or where pandering to non-consenting adults or juveniles has taken place. In fact it is these situations which the Commission felt should be regulated, **Report** at 56-62.

It is beyond question that both the State and Federal Governments must have a rational basis for enacting legislation, **Williams v. Lee Optical,** 348 U.S. 483 (1955); c.f. **Leary v. U. S.,** supra. No rational basis exists for having obscenity prohibition legislation where consenting adults are involved. This was clearly shown by the **Report.** The circumstances in **Buck v. Bell,** 274 U.S. 200 (1927), should be informative to this court in deciding the Constitutional issues involved instanter. In **Bell,** a Virginia statute allowed sterilization of feeble minded persons after very strict procedures were followed. This court found a rational basis for the statute as there was **scientific evidence** that such disease is hereditary. Instanter, no evidence can be adduced to show a rational basis for obscenity statutes relating to consenting adults as none exists. Thus, such legislation is truly in violation of the Fifth and Fourteenth Amendments.

To permit the First Amendment to be eroded without constitutional basis because of some unpopular sentiment toward the expression involved will result in the creation of numerous additional exceptions to that Amendment which will lead to the eventual destruction of this most important and time honored right.

CONCLUSION

Amici respectfully submit that this Court must hold that the First Amendment absolutely protects the right of a previously forewarned adult to buy, sell, receive, write, publish, distribute, disseminate and/or exhibit even hard core pornography and obscene material provided there is no assault or intrusion upon the sensibilities of other non-interested adults, no pandering, and no juvenile involvement. The Constitution of the United States, and the First Amendment thereto, stands as a bar against any limitation upon the right of adults to read or view sexually explicit material. The State and the Federal Governments' concern is properly limited to the dissemination of such material only where there is an assault or intrusion upon the sensibilities of other non-interested adults, pandering, or juvenile involvement.

Respectfully submitted,

JOEL HIRSCHHORN,
RALPH J. SCHWARZ, JR.,
MEL S. FRIEDMAN,
Amici Curiae.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

JOEL HIRSCHHORN,
Amicus Curiae

APPENDIX

Commonwealth of Virginia

OFFICE OF THE ATTORNEY GENERAL
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
703-770-2071

August 9, 1972

Joel Hirschhorn, Esquire
1040 City National Bank Building
Miami, Florida 33130

Re: Alexander, et al., v. Virginia
United States Supreme Court
Case No. 71-1315

Dear Mr. Hirschhorn:

In your letter of July 28, 1972, you advised that the First Amendment Lawyers Association has requested that you write a brief as amicus curiae in the above captioned case. You have requested our permission to file this brief.

Please be advised that the Commonwealth of Virginia has no objection to you filing a brief as amicus curiae in the above case.

Very truly yours,

/s/ James E. Kulp
James E. Kulp
Assistant Attorney General

JEK/cj
CC: Stanley M. Dietz, Esquire

STANLEY M. DIETZ
Attorney at Law

August 8, 1972

Joel Hirschhorn, Esquire
1040 City National Bank Building
Miami, Florida 33130

Dear Joel:

Your correspondence of July 27, 1972, requesting permission to file an Amicus Curiae Brief, in the case of Alexander vs. Commonwealth, Supreme Court No. 71-1315, received. Permission is granted. The Appellant's Brief is due August 10, 1972.

Kindest personal regards.

Cordially yours,

/s/ Stanley M. Dietz
Stanley M. Dietz

SMD/lg
occ: James E. Kulp, Esquire
Assistant Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219

In the

Supreme Court

of the

United States

OCTOBER TERM, 1971

MOTION FILED
OCT 7 1972
Denied 10-16

NO. 71-1315

HOWARD ALEXANDER, et al.,
Petitioners,

vs.

COMMONWEALTH OF VIRGINIA,
Respondent.

**On Writ of Certiorari to
The Supreme Court of Virginia**

Motion for Leave to File Untimely Amicus Curiae Brief and to Participate in the Oral Argument by Joel Hirschhorn, Esq., as Amicus Curiae in Support of Petitioners.

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

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HOWARD ALEXANDER, et al.,

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Respondent.

On Writ of Certiorari to
The Supreme Court of Virginia

Motion for Leave to File Untimely Amicus Curiae Brief and to Participate in the Oral Argument by Joel Hirschhorn, Esq., as Amicus Curiae in Support of Petitioners.

Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S. Friedman, Esqs., amicis Curiae on behalf of Petitioners respectfully moves that leave be granted to Joel Hirsch-

horn to participate in the oral argument as amicus curiae in support of Petitioners. A brief amici curiae by the said Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S. Friedman, Esq., on behalf of Petitioners, has heretofore been filed with the court with the consent of all the parties to the cause.

1. The interest of amici in this case arises from the fact that they are counsel in a profusion of cases, in Federal and State courts throughout the United States involving the same constitutional issue before the court in this case, namely, whether it is constitutionally permissible for a State to punish the dissemination of allegedly obscene material to adults, in the light of the free speech and press, due process and equal protection provisions of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

2. The First Amendment Lawyers' Association is an informal organization comprised of approximately seventy-five attorneys who participate extensively in First Amendment litigation involving literally thousands of cases throughout the United States in both State and Federal courts.

3. Amici believe that oral argument will provide assistance to the court, not otherwise available. The formulation of standards and criteria, relative to the dissemination of material dealing with sex and nudity to adults, by the court, involves considerations reaching beyond the particular concrete situation presented in the case herein. There is need for the court to know, it is submitted, the operation and effect of obscenity statutes

and their impact upon the exercise of freedoms of speech and press by the adult community throughout the United States. Oral argument would offer the opportunity to present to the court essential facts, important data, and empirical evidence, as well as a summary of diversified experiences which bear importantly upon the substantial constitutional question presented to the court. The argument would inform the court with respect to the chilling effect of obscenity statutes upon the circulation of constitutionally protected material to adults. There is also probative data available that obscenity statutes for adults necessarily lend themselves to arbitrary, discriminatory and selective enforcement. The information and evidence which amicus is prepared to furnish the court on oral argument will, it is submitted, be fruitful, illuminating and helpful to the court in determining the substantial constitutional issue presented in the case.

4. The instant brief of amici curiae is not timely due to the following facts:

a. The decision to write a brief as amici curiae was made after the respective due date of counsel of records' brief;

b. Due to the press of numerous other trial and appellate matters the undersigned amici were unable to complete this brief timely;

c. This brief and motion is filed in good faith and with the intention of aiding this court in resolving the urgent and vital issues presented to the court.

WHEREFORE, amici respectfully pray that the Motion for Leave to File Untimely Brief as amicus curiae be granted, and the Motion for Leave to Participate in the Oral Argument by Joel Hirschhorn, as amicus curiae, likewise be granted, and that the court allot such time for oral argument as may seem proper.

DATED: October 2, 1972.

Respectfully submitted,

Joel Hirschhorn, Amicus Cruiae
Ralph J. Schwarz, Jr., Amicus Curiae
Mel S. Friedman, Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

JOEL HIRSCHHORN, Amicus Curiae

PE

CUR

R

IAM

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1315

Howard Alexander et al., Petitioners, v. Commonwealth of Virginia. } On Writ of Certiorari to the Supreme Court of Virginia.

[June 25, 1973]

PER CURIAM.

The judgment of the Supreme Court of Virginia is vacated and the case is remanded for further proceedings consistent with *Miller* v. *California*, — U. S. — (pp. 9–11) (1973), *Paris Adult Theatre I* v. *Slaton*, — U. S. — (pp. 8–9, n. 7) (1973), and *Heller* v. *New York*, — U. S. — (1973). See *United States* v. *12 200-Ft. Reels*, — U. S. — (p. 7, n. 7) (1973). A trial by jury is not constitutionally required in this state civil proceeding pursuant to § 18.1–236.3 of the Code of Virginia, 1950, as amended. See *Melancon* v. *McKeithen*, 345 F. Supp. 1025, 1027, 1035–1045, 1048 (ED La. 1972), aff'd *sub nom. Mayes* v. *Ellis*, 409 U. S. 943 (1972), and *Hill* v. *McKeithen*, 409 U. S. 943 (1972). Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 443–444 (1957).

Vacated and remanded for further proceedings.

MR. JUSTICE DOUGLAS would reverse the judgment of the Supreme Court of Virginia. See *Miller* v. *California*, — U. S. —, — (DOUGLAS, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 71–1315

Howard Alexander et al., Petitioners, *v.* Commonwealth of Virginia. | On Writ of Certiorari to the Supreme Court of Virginia.

[June 25, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I would reverse the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with my dissenting opinion in *Paris Adult Theatre* v. *Slaton* — U. S. — (1973). See my dissent in *Miller* v. *California*, — U. S. — (1973).

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1971

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS, INC., MEDIA ARTS, AND GUILD PRESS, LTD.,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR REHEARING

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Richmond, Virginia 23219

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR REHEARING

The Commonwealth of Virginia petitions this Honorable Court for a rehearing concerning the decision in this case rendered by this Court on June 25, 1973.

GROUNDS FOR REHEARING

This case was one of a number of cases dealing with obscenity which this Court agreed to hear in an effort to fashion some semblance of order out of the chaos which has surrounded this particular field of law during recent years.

This case arose under the civil procedure for determining obscenity pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as amended. Sub-section 8 (b) specifically provides that the "community standard" to be applied in testing obscenity is the standard of the *county* or *city* in which the proceeding is brought. In conformity with the language of this statute, the trial court applied the standards of the City of Portsmouth, Virginia, the jurisdiction in which the action was brought. This local standard was approved by the Supreme Court of Virginia in *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972); and again in *Price* v. *Commonwealth*, 213 Va. 113, 189 S.E.2d 324 (1972).

In petitioner's brief it was specifically urged that the use of the local community standard by Virginia rather than a state-wide or national standard violated the Constitution. See Petitioner's Brief pgs. 14-18. This issue was also crystalized in the Questions Presented. See Petitioner's Brief pg. 2. The petitioner's argument was discussed in the respondent's brief pgs. 8 and 9. In addition, both parties addressed themselves to this issue during oral argument before this Court on October 19, 1972.

The *Per Curiam* opinion of this Court rendered on June 25, 1973, vacates the judgment of the Supreme Court of Virginia and remands the case for further proceedings consistent with *Miller* v. *California*, ... U.S. ....., 13 Cr. L. 3161 (1973), and other cases rendered at the same time and similarly considering the question of obscenity.

In *Miller* this Court specifically rejected the notion that a state was required to structure obscenity proceedings around evidence of a *national* "community standard." The majority found that the contemporary standards of the State of California was constitutionally adequate. However,

it is unclear whether Your Honors approved the *local* community standard applied in this case. There is language in *Miller* which is susceptible of interpretation that the majority did in fact approve a local standard, and there is other language which can be read to mandate that only a state-wide standard is constitutionally permissible. The Court's use of the following language tends to support the constitutionality of a local standard:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (..... U.S. ....., 13 Cr. L. at 3166).

In this quoted material, the Court has spoken in terms of both states and localities. The majority has also referred to "local" community standards in footnote 13, in that case. It would also appear that the Court has approved a local standard when it recognized that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community. . . ." 13 Cr. L. at 3165.

On the other hand, the Court utilizes additional language which seems to indicate that the standard to be applied is that of the entire state:

> "Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for

> all 50 States in a single formulation, even assuming the prerequisite consensus exists." (13 Cr. L. at 3165).

The majority opinion also said that, "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." 13 Cr. L. at 3166.

The Commonwealth of Virginia submits that the language in *Miller* is not free from doubt as to the permissible use of a local standard as required by the Virginia statute and interpreted by the Supreme Court of Virginia. It is earnestly requested that the Court clarify the standard which can be used in determining obscenity, and remove any ambiguity concerning the utilization of a local standard. This precise issue was fairly and clearly presented to the Court in this case, and the resolution of this issue now can forestall further needless litigation on this issue. It appears that at least seven other states also utilize the local standard. *Gornto* v. *State*, 178 S.E.2d 894 (Ga. 1970), cert. den. 402 U.S. 933 (1972); *People* v. *Bloss*, 27 Mich. App. 687, 184 N.W.2d 299 (1970), vacated on other grounds, 201 N.W.2d 806 (1972); *McKinney* v. *State*, 254 So.2d 714 (1971), cert. den. 405 U.S. 1075 (1972); *Gent* v. *State*, 393 S.W.2d 219 (Ark. 1965); Rev. on other grounds 386 U.S. 767 (1967); *State* v. *Henry*, 198 So.2d 889 (La. 1967), rev. on other grounds 392 U.S. 655 (1968); *Davidson* v. *State*, 251 So.2d 841 (Fla. 1971), appeal pending; *State* v. *Miller*, 112 S.E.2d 472 (W.Va. 1960).

To leave this matter in a state of limbo will only prove to be disruptive and vexatious to state courts and this Court by needless and repetitious litigation.

CONCLUSION

For the reasons set forth it is submitted that this Court should clearly and unequivocally resolve the issue as to whether a local community standard in determining obscenity is constitutionally permissible.

Respectfully submitted,

ANDREW P. MILLER
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Supreme Court–State Library Building
Richmond, Virginia 23219

SPECIAL CERTIFICATE

I, James E. Kulp, a member of the Bar of the Supreme Court of the United States, pursuant to Rule 58 do hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

JAMES E. KULP
Assistant Attorney General

CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, of counsel for the respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 13th day of July, 1973, I mailed 3 copies of the foregoing to Stanley M. Dietz, Esquire, 1029 Vermont Avenue, N.W., Washington, D.C. 20005, counsel for Petitioners.

JAMES E. KULP
Assistant Attorney General